Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR N. BERNKLAU,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE DEPARTMENT OF VETERANS AFFAIRS, AND JESSE BROWN, SECRETARY OF VETERANS AFFAIRS
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court is required to resolve the inter Circuit conflict which exists among the several circuits which hold that the VA's policies, practices and procedures are subject to judicial review, as contrasted with the several circuits which hold otherwise?

2. Whether a constitutional attack on the operation of the VA's claims system is subject to judicial review as required under Johnson v. Robison, but denied similar consideration in the 2nd Circuit?

3. Whether the passage of 1988 Veterans Judicial Review Act (VJRA), P.L. 100-687, overruled the Johnson v. Robison decision which permits an attack on the operation of the VA's claim system?

4. Whether federal statutes which foster the unconstitutional treatment of veterans' claims are subject to judicial review?

5. Whether the separation of powers doctrine applies to federal statutes governing veterans disability claims?

6. Whether VA disability claims decisions based upon race, color and gender are subject to judicial review, considering 38 U.S.C. § 211(a), the no judicial review clause?

7. Whether this Court will reexamine, the Johnson v. Robison decision, which upheld the constitutionality of 38 U.S.C. § 211(a), considering that said decision was premised upon deliberately false information given to said Court by the VA?

8. Whether budgetary driven claims decisions denying veterans fair and impartial claims consideration is subject to judicial review?

9. Whether the lack of meaningful Congressional oversight pursuant to veterans disability claims, absent judicial review thereof, require the Courts to adopt strict scrutiny standards when reviewing veterans complaints of unconstitutional treatment?

10. Whether allegations of equal protection violations require judicial review - not outright dismissal thereof, without addressing any of the said allegations?

11. Whether similarly situated veterans were treated equally, with those constituents (veterans) of certain influential Congressmen, whose names were placed upon the VA's preferential signature list entitling said constituents to extra claims consideration?

12. Whether veterans disability claims when awarded are gratuities or analogous to workmen's compensation?

13. Whether VA laws authorizing bribes [see: 38 U.S.C. § 5902(a)(2)], are constitutional and/or subject to judicial review - when the sole purpose thereof, is to purchase silence from the national veterans service organizations, pursuant to the VA's unconstitutional treatment of its members' claims?

14. Whether the instant action was brought in the guise of a constitutional complaint, requiring dismissal thereof, when Petitioner did not ask for judicial review pursuant to the merits thereof, no matter how wrongly decided but, instead, sought relief from the unconstitutional treatment accorded him?

15. Do American families, whose sons and daughters are routinely recruited into the armed forces, have the right to know that if injured, their offspring will have no right to judicial review pursuant to their disability claims?

16. Whether any portion of the Johnson v. Robison decision has been overruled by this Court subsequent to its 1974 decision?

17. Whether the recently enacted Veterans Judicial Review Act (VJRA) [see: P.L. 100-687, November 18, 1988], is constitutional, considering its limited jurisdiction, deficiencies, and requisites of fundamental fairness absent in said legislation?

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Jurisdiction

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I. STATEMENT OF THE CASE/Background

The issues presented for this Court's consideration involve primarily Congress's enactment of improvident Veterans Administration (VA) laws which foster the unconstitutional treatment of veterans' disability claims to include the denial of judicial review; the unfettered right to retain an attorney; the disdain for the separation of powers concept; and the licensing of bribery to induce the silence of the National Veterans Organizations (NVSO's).

Contributing to the unconstitutional treatment accorded veterans claims is the lack of Congressional oversight and the unwillingness of the 2nd Circuit - contrary to other Circuits' and this Court's prior rulings - to afford any forum at all in which to present evidence attacking the constitutionality re the operation of the VA's claim system.

Because of the above, and the lack of any meaningful scrutiny of the VA's sub rosa policies, practices and procedures - Vetgate (the veterans' Watergate), is perhaps the largest unreported scandal in American history - encompassing a cast of millions, a budget in billions and a barn door wide open. Contributing to the continuance thereof of said scandal, is the refusal of the 2nd Circuit, once again, as it has on so many prior occasions - to examine the evidence of Constitutional dimension brought to its attention.

Not generally understood, is the fact that the VA operates with little or no constraints imposed upon it, since its decisions are not subject to judicial review [see: 38 U.S.C. § 511(a) - former and hereinafter referred to as § 211(a)] - made far worse, by a lack of Congressional and Press oversight.

Likewise, little known by the Courts, is the fact that the National Veterans Service Organizations (NVSO's), the perceived protectors of veterans' interests - have been bought off pursuant to present

38 U.S.C. § 5902(a)(2); - former § 3402(a)(2)] which permits the Secretary of Veterans Affairs to provide substantial office space and other benefits without charge - at his sole discretion - contingent upon the NVSO's good behavior. [Appendix C - 23, 35, 36]

Accordingly, employment with the V.A. is much sought after and is considered to be a bureaucrats' dream: high in the budget and low in visibility. Precisely the scenario which Lord Acton envisioned when he cogently observed that: " Power corrupts, while absolute power corrupts absolutely !"

Consequently, this Court should not be surprised at the circumstances which require its attention, and why it's essential to overrule the 2nd Circuit's dismissal (without just cause) of the instant action so that "light the great disinfectant" may be focused upon the constitutionality of statutes which foster the VA's impermissible policies, practices and procedures - and, which in their totality, serve to deny veterans fair and impartial claims consideration.

Further, it is incumbent upon this Court, to ensure that Petitioner is afforded the opportunity of presenting the massive amount of evidence which has been compiled, with the aid of Veterans Due Process, Inc., documenting systemic VA wrongdoing resulting in the denial of fair and impartial claims consideration. And equally important, is the requirement to make certain that the VA's bureaucrats are "bound down from mischief by the chains of the constitution" {Thomas Jefferson}.

What should surprise this Court, however, is the inter Circuit conflict which currently exists between the 2nd, 5th, and 1st Circuit on the one hand - and the 7th Circuit's (en banc) decision in Marozsan v. U.S. 852 F.2d 1469 (1988) to include the 9th, 4th and 8th Circuits on the other -- over whether the VA's policies, practices and procedures are subject to the Court's jurisdiction or not.

Moreover, of even greater significance - are two Supreme Court decisions which the 2nd Circuit declined to follow, *much less mention* - namely: Johnson v. Robinson, 415 U.S. 360 (1974) and Walters v. NARS. 473 U.S. 305, 311, note 3 (1985), which decisions held that an attack on the constitutionality re the operation of the VA's claim system is subject to judicial review.

In effect, the 2nd Circuit's contrary ruling (in this case) precluded the Petitioner from pursuing a constitutional attack on the operations of the VA claims system by declining to review its unconstitutional policies, practices and procedures, to include a description thereof, as alleged in the complaint.

Further, the 2nd Circuit erroneously reasoned that the Petitioner was seeking judicial review pursuant to his claim - and consequently, monetary damages - when there was not one shred of evidence in any of petitioner's numerous written submissions to support that bogus conclusion.

Additionally, the 2nd Circuit asserted that the Petitioner had not mounted a facial attack on the statutes questioned and that the instant action was framed in the guise of a constitutional complaint - despite overwhelming evidence to the contrary, as alleged in the Petitioner's complaint, the numerous submissions thereof, and substantial evidence furnished in support of the allegations.

By that reasoning, the 2nd Circuit dismissed the instant action, as it has all prior actions, which sought to challenge the constitutionality re the operation of the VA's claims system. Inexplicably, said decision was based on erroneous (non existent) facts clearly contrary to the record established - and contrary to controlling case law.

Accordingly, said decision to dismiss was clearly arbitrary and an abuse of the 2nd Circuit's discretionary power, requiring that the instant action

be reinstated and returned to the District Court pursuant to the arguments presented herein.

II Argument

A. Re: 2nd Circuit's Rejection Supreme Court decisions

The 2nd Circuit's decision pursuant to the instant matter raises substantial questions of constitutional dimension while answering none. And those that it purports to answer are clearly violative of Constitutional case law, as established by the United States Supreme Court in Johnson v Robison and Walters v NARS, as cited herein.

Curiously, the 2nd Circuit writes in its threadbare decision that:

> "Because the district court correctly concluded that Bernklau's complaint constituted a challenge as to how the Veterans Administration operate[s] not to the statute [s] on [their] face, we affirm the judgment of the district court . . . " (emphasis added)

Based upon the 2nd Circuit's own words, how can it hope to reconcile its holding with Chief Justice Rehnquist's majority opinion, as expressed in Walters v NARS, 473 U.S. 305, 311, note 3 (1985) interpreting 38 U.S.C. § 211(a) as permitting a constitutional attack on the operation of the VA claims system that allegedly denied due process, advising at note 3 that:

> "Despite the general preclusion of judicial review with respect to V.A. benefit claims, this Court held in Johnson v Robison, 415 U.S. 361, that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems." (emphasis added)

Clearly two U.S. Supreme Court decisions permit attacks on the operation of the V.A. claims system, while the 2nd Circuit does not, if its own written words are to be taken at face value. And if the Supreme Court is correct, how could Petitioner's attack be anything other than an assault on improvident laws which foster the V.A.'s sub rosa policies, practices and procedures? How could Petitioner's complaint be anything other than an attack on the V.A. claims system, precisely what the 2nd Circuit precludes herein in its own written opinion? How could the 2nd Circuit be lacking in jurisdiction considering this court's prior two decisions specifically authorizing the type of action brought herein?

Obviously, nothing could be clearer or more dispositive, than the 2nd Circuit's flagrant disregard of two Supreme Court opinions, as expressed in Johnson and Walters, which opinions were energetically brought to its attention - to no avail. Those circumstances together with everything else, were likewise ignored, as the 2nd Circuit strove to remove the instant matter from its docket irrespective of the facts or controlling case law.

Understandably, the Petitioner is entitled to reinstatement pursuant to Johnson, the seminal case re veterans' jurisprudence (later reiterated in Walters) which specifically permits attacks on the operation of the V.A. claims system, while the 2nd Circuit inexplicably does not - - failing to provide any reasoning whatever for its contrary holding. Since the 2nd Circuit either cannot, or will not explain its contrary ruling, its decision must be overturned, as controlling case law requires.

B. Argument re: Conflict Among the Several Circuits - 2nd Circuit's Rejection of Marozsan v. U.S., 852 F.2d 1469 (7th Cir. En Banc, 1988)

An inter Circuit conflict of wide-spread proportions is evidenced by the differing opinions as reflected in Eastern Paralyzed Veterans v. Veterans Administration, 762 F. Supp. 539, 543, 544 (S.D.N.Y. 1991), which reasoned that:

> "Following Marozsan, one court in this district has stated that there exists a conflict in circuits on 'the issue of whether or not the Judicial Review Preclusion [of § 211(a)] precludes a review of the constitutionality of VA procedures and practices." Cooper v. United States, No. 88 CIV 6106, slip op., 1989 WL 71213 (S.D.N.Y. June 23, 1989) (available on LEXIS 6924), That court cited the Fifth Circuit's decision in Anderson, and the Seventh Circuit's decision in Marozsan, as presenting conflicting views. {emphasis added}

Further, the Eastern Paralyzed Veterans decision at 542 thereof, clearly looking for guidance, described at some length, the extent of the conflict - in which the 5th, the 1st, and the 2nd Circuit were in disagreement with the 7th, the 9th, the 4th, and the 8th Circuit on the issue of whether judicial review was permissible where veterans challenged the VA's procedures pursuant to the administration of their claims.

Based upon the foregoing, and the Eastern Paralyzed Veterans Court's assessment thereof, there appears to be substantial disagreement, among the various circuits, over the practices and procedures issue and whether said practices and procedures are subject to judicial review or not. Under the circumstances, such widespread conflict among the Circuits, as reported by Eastern Paralyzed Veterans, requires this Court's urgent resolution thereof.

C. Argument re: Implausibility of Eastern District Court's Decision in Bernklau

The Eastern District Court in conjunction with the 2nd Circuit held that the Marozsan's en banc decision was irrelevant (Appendix: A-6, 7), since it was decided prior to the 1988 passage of the Veterans Judicial Review Act (VJRA) [see: Public Law No. 100-687, November, 1988)]. By inference, Petitioner could also posit that Johnson v Robison and Goldberg v Kelly and Walters v NARS and other important veterans' cases likewise decided prior to November, 1988, must be similarly irrelevant. Stare Decisis, under the 2nd Circuit's concept of jurisprudence, as applied to veterans case law, is simply a nullity.

Thereupon, the question arises as to whether this Court has overturned Johnson, Goldberg, and Walters, or whether the enactment of the VJRA has rendered the aforesaid decisions null and void? Petitioner thinks not, since no evidence thereof can be found anywhere, other than the 2nd Circuit's blanket assertion absent any explanation thereof.

Accordingly, let's examine what Marozsan held and ascertain what remains relevant today. At 1472 Maroszan held:

> "The logical extension of the Supreme Court's reasoning in Johnson and Traynor v. Turnage and the structure of our Constitutional form of government dictate that we not read § 211(a) to preclude all judicial review of a veteran's serious claims. To preserve its constitutionality, we must instead construe § 211(a) to allow substantial constitutional challenges to the veterans' benefit statutes and regulations, as well as to the procedures established by the VA to administer them."

Later, at 1473 the majority opinion reasoned:

> "In Winslow v. Walters, 815 F.2d 1114, 1117 (7th Cir. 1987), a veteran filed an action challenging

the constitutionality of the V.A.'s procedures, claiming that the agency did not provide him with a hearing before changing his disability rating. We held in Winslow that § 211(a) does not bar review of claims that procedures of the V.A. violate the due process clause."

"In Mathes v. Hornbarger 821 F.2d 439, 440 (1987) we reiterated the holding of Winslow that ["federal courts are not divested of jurisdiction over suits challenging the constitutionality of the VA's procedures under the Due Process Clause of the Fifth Amendment"]."

"The narrow interpretation of § 211(a) that we adopted in Winslow and Mathes is not only viable, it is required in order to avoid the serious constitutional questions necessarily raised by a broader construction of the statute."

At 1478, the majority opined:

"If § 211(a) precluded review, it would subvert the judiciary's function of providing a ["check against arbitrariness and self aggrandizement by Congress, the Executive, and their administrative agents."] Fallon, 101 Harv L.Rev. at 975-76]."

"To deny jurisdiction to claimants like Marozsan would be to find that veterans simply have no forum in which to pursue a claim that the V.A. violated the Constitution. The necessary implication of such a holding, candidly conceded by the government at oral argument, is that the VA may not be called to account for any method it uses in administering the veterans' laws, no matter how egregious. Surely, if the VA could deny hearings and employ arbitrary quotas without judicial review, as is alleged here, it could also grant benefits only to

> those born on July 4th or only to white veterans. A statute which precludes review of such obviously unconstitutional decisions must be just as unconstitutional as the underlying action of the Administrator." (emphasis added)
>
> "The government conceded at oral argument that its broad interpretation of § 211(a) bars review of such abhorrent practices . . . An alleged arbitrary quota system that obviates the Administrator's need to consider the evidence is no mere detail but a serious question of constitutional dimension. The V.A.'s procedures may not be scrutinized for a high degree of accuracy but must comport with the minimum requirements of due process."

From all of the foregoing, it is apparent that § 211(a) is no bar to judicial review pursuant to the VA's covert policies, practices and procedures which denied veterans fair and impartial claims consideration. This is especially true, when one considers that the 2nd Circuit in New York City v. Heckler, 742 F.2d 729 (1984) ruled against these very same covert practices and procedures in Social Security claims - and with far less evidence. Moreover, the 2nd Circuit was sustained in its opinion by this Court's unanimous holding in Bowen v. The City of New York, 476 U.S. 467 (1986).

If fair and impartial claims consideration is appropriate in Social Security circumstances, why is it inappropriate in the context of veterans jurisprudence?

To conclude, Marozsan at 1473 held: " . . . in Winslow that § 211(a) does not bar review of claims that the procedures of the V.A. violate the due process clause." Whereas, the 2nd Circuit ruled just the opposite, inasmuch as, unlawful policies, practices and procedures as alleged in the complaint did not evidence a constitutional challenge to the statutes on their face.

The aforementioned differing opinions held by the various Circuits require resolution by this Court, at its earliest convenience.

D. Argument re: Petitioner's Facial Challenge

1. The 2nd Circuit concluded that since the Petitioner attacked the operation of the VA claims system that he did not pose a facial challenge to the statutes enumerated in his complaint - and as a consequence thereof, dismissed the instant action. The 2nd Circuit further reasoned, that the only veterans action permitted in the 2nd Circuit was one presenting a facial challenge to the statutes themselves. Petitioner does not understand nor has the 2nd Circuit explained why his facial challenge to the statutes was deficient.

Under the circumstances, the Petitioner brought his complaint challenging the constitutionally questionable statutes enumerated therein, under 28 U.S.C. 1331, the federal question jurisdiction statute. Accordingly, the 2nd Circuit was put on notice and should have recognized the existence of a facial challenge after reading the "Complaint" which contained the following language and/or allegations:

a) On page 1 thereof: "This action arises under the Constitution, challenging the V.A.'s budgetary (not fact driven) "quota system" of injustice employed when adjudicating veterans' disability claims. Moreover, plaintiff alleges that the VA employs unpublished "sub rosa" policies, practices and procedures, the totality of which violates his and other veterans' First and Fifth amendment rights to include due process, equal protection and meaningful representation."

b) On page 3 & 4 thereof: "Plaintiff seeks no adjudication of his disability claim, no matter how unjustly decided, petitioning solely for judicial

redress of the unconstitutional treatment fostered under statutes as written and/or as applied."

c) On page 24 thereof, under the relief requested caption: "Wherefore Plaintiff implores this Court to review the constitutionality of the VA's claim adjudication system in its totality by considering the policies, practices, and procedures complained of herein to include such laws which foster the unconstitutional treatment cited herein pursuant to veterans claims. . . . Accordingly, Plaintiff's petition for judicial redress entreats this Court to declare the following statutes as written or as applied to be unconstitutional:

1) 38 U.S.C. § 211(a) - *{now}* 38 U.S.C. § 511(a).
2) 38 U.S.C. § 3404(c) - *{now}* 38 U.S.C. § 5904(c).
3) 38 U.S.C. § 3405 - *{now}* 38 U.S.C. § 5905.
4) 38 U.S.C. § 3402(a)(2) *{now}* 38 U.S.C. § 5902(a)(2).
5) 38 U.S.C. § 7292.
6) Public Law No. 100-687 § 402, 102 Stat. 4122 (1988) *{Veterans Judicial Review Act (VJRA)}*
7) 38 U.S.C. § 7255 (notwithstanding law, CVA sits only in Washington, D.C.)."

Based upon the forgoing, and other submissions, a facial challenge was mounted against the constitutionality of the statutes, which in their totality deny veterans fair and impartial claims consideration in deference to OMB.

Throughout the Complaint, explanations were provided as to why said statutes were unconstitutional. Accordingly, a facial challenge was mounted, and nothing has been offered to the contrary by the 2nd Circuit other than a blanket, conclusionary assertion bereft of substance and/or meaning.

Under the circumstances, how could the Complaint be other than a facial challenge to the constitutionality of the aforesaid cited statutes?

2) In Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) a facial challenge was defined as follows:

> "there are two different ways in which a statute or ordinance may be considered invalid on its face, either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad."

Petitioner submits, that his facial constitutional challenge to the enumerated veterans statutes survives on both counts assuming that is the only criteria for defeating the 2nd Circuits dismissal ruling, by considering the following:

a) The unfettered right to retain an attorney at a veterans own expense infringes on a veterans protected right to free speech. [Appendix B: 3, 4]

b) The denial of due process resulting in decisions which are fundamentally unfair; lacking an impartial decision maker; ruling contrary to the evidence; under duress from OMB; are violative of the Fifth Amendment. [Appendix C: 9-10, 12-14, 15-17, 18-21, 26-29, 30-31, 35-36, 38, 40-44, 45-48, 55, 56]

c) The failure to provide for judicial review [Appendix B: 2 -- 38 U.S.C. § 211(a)]

d) The enactment of bribery laws by Congress, designed to distance NVSO leadership from its members. [see: statute § 3402 - Appendix B: 3]

e) The lack of equal protection accorded to veterans similarly situated pursuant to favoritism provided to those constituents of influential Congressmen named to the VA's preferential signature list; and local hearings held solely for the benefit of NVSO represented veterans as opposed to those not so represented. [Appendix C: 1, 2, 33, 34, 49, 50, 59, 60]

f) The failure to permit veterans to litigate their disability claims in the locales nearest their homes, not exclusively in Washington, D.C. [Appendix B: 5]

g) The enactment of laws which make a mockery of the Separation of Powers concept so carefully

nurtured by the "Framers" in which the VA is sole rule giver, judge, jury, court of appeals and executioner; incomprehensibly granting the V.A. more power than Congress has itself. [Appendix B: 2]

h) Approximately 90% of all veterans have been excluded from the alleged benefits of the 1988 VJRA [creation of the Article 1 U.S. Court of Veterans Appeals], if their claims were finalized prior to November 18th, 1988. Consequently, veterans have gone to their graves and will continue to do so, never having received due process, equal protection, or access to attorneys in the first instance, are now being denied it in the second instance, assuming it exists at all under VA auspices.

Accordingly, is it possible that allegations challenging statutes which contribute to a denial of fundamental fairness and judicial redress in claims adjudication - involving only half, but not all veterans - fails to meet the facial challenge test? Also, is possible that the right to be meaningfully heard likewise fails to meet the facial challenge test? Further, do allegations of equal protection deprivations fall short of meeting the facial challenge test? What of the allegations regarding the separation of powers defect in the statutes cited? What of the allegations pursuant to the Bill of Rights? How was the facial challenge deficient since no explanation was forthcoming from the 2nd Circuit?

The above, and many more allegations not mentioned herein, support the requirement to superimpose meaningful scrutiny over veterans' statutes at trial, not summary dismissal thereof.

In fact, the entire system cries out for thorough and comprehensive court review thereof, too long avoided by the Courts while studiously ignoring the plight of disabled veterans.

Much too long ignored, while the Courts deferred to the VA's bureaucrats, underscored by the chill imposed by 38 U.S.C. § 211(a), and the creative use made thereof to deny veterans hearings pursuant

to the operation of the VA's claim system. In effect, relegating veterans to the status of 2nd class citizens. Meanwhile, the law breakers continue to wreck havoc upon helpless veterans while the band played on to the accompaniment of the VA's splendid isolation, and the betrayal of veterans.

As Justice Brandeis observed in Olmstead, 277 U.S. at 485: "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by example. Crime is contagious. If the government becomes the law breaker, it breeds contempt for the law . . . "

This section may be summed up by the opinion expressed in I.N.S. v. Chada, 462 U.S. 919 (1983):

> "The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution."

E. Argument re: Vulnerability of Johnson v. Robison

Petitioner believes that there exists a strong likelihood of having § 211(a) declared unconstitutional, in view of the fact, that the Johnson Court's rationale was fatally flawed, being premised upon erroneous facts (lies) orchestrated by the V.A.

For example, the VA asserted that its system was non adversarial, when it was simply non-confrontational and disingenuously hostile; it further asserted that is was better at adjudicating complex medical claims than the Courts, despite the fact that its personnel were rendering medical judgments (denials) at the rate of one per minute without regard to the treating physicians' oftentimes expert opinions; it additionally asserted that it was able to render more uniform decisions than the Courts, despite the fact that none of its decisions were codified and admittedly couldn't render uniform decisions on the same floor, in the same building, much less, throughout the United States; it likewise asserted that

its handling of veterans' claims was conducive to raising an army, when if the "awful truth" were known by the American people, it couldn't raise a fourth for bridge, much less an army.

All of the foregoing blatant distortions of the truth entered significantly into the Johnson court's rationale for holding § 211(a) constitutional, when if the truth thereof were known to Johnson, it is doubtful whether said statute would have survived constitutional scrutiny. Accordingly, the Johnson decision hangs by a tenuous thread of legitimacy.

F. Argument re: Subject Matter Jurisdiction

Rulings pursuant to subject matter jurisdiction may be found in Marozsan v U.S. (en banc) 852 F.2d 1469 (7th Cir. 1988) and D.A.V. v U.S., 962 F 2d 136, 141 (2nd Circuit, 1992). In D.A.V., the Court held:

> "Here since the veterans neither make a claim for benefits, nor challenges the denial of such a claim, but rather challenges the constitutionality of a statutory classification drawn by Congress, the District Court had jurisdiction to consider their claims."

It is absolutely clear from the Petitioner's complaint (and other submissions), that the criteria established under D.A.V. has been satisfied. Here, Petitioner makes no claim for benefits, nor challenges the denial thereof, instead challenges the constitutionality of statutes which foster the V.A.'s unlawful policies, practices and procedures which serve to deny veterans fair and impartial claims consideration. Surely said allegations rise to the level of constitutional dimension - if they do not, no explanation has been supplied by the 2nd Circuit to support its contention regarding the lack thereof.

Based upon the foregoing, the 2nd Circuit had no basis to deny Petitioner - subject matter jurisdiction - since he did not seek District Court

review of his claim, no matter how unjust the VA decision was, nor did he seek monetary damages (as emphasized in his complaint).

G. Argument re: Larrabee by Jones v. Derwinski 968 F. 2d. 1497 (2nd Cir, 1992)

The Eastern District Court judge, the defendants, and the 2nd Circuit Court panel have all erroneously cited Larrabee by Jones v. Derwinski, as case law, requiring dismissal of the instant case. As the facts will attest, the circumstances prevailing in said case are easily distinguishable from those of the instant matter, so clearly demonstrated by the following facts:

1) Petitioner does not seek District Court judicial review pursuant to the merits of his disability claim or monetary damages as did Larrabee.

2) Petitioner complains of coerced budgetary (not fact driven) claims decisions, often contrary to the professional opinions of the adjudicators themselves, in deference to OMB, whereas Larrabee asserts that the V.A. failed to give him adequate medical care.

3) Petitioner complains of unconstitutional policies, practices and procedures utilized when rendering claims decisions, not so with Larrabee.[1]

Some examples of Unconstitutional Practices and Procedures:

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1 Sugrue v Derwinski, 26 F. 3d 8, 11 (2d Cir 1994) is likewise inappropriately cited, since the Plaintiff therein, requests an enhanced disability rating, requiring litigation or judicial review thereof in the District Court - and, therefore, that matter is easily distinguished from the instant circumstances.

a) Preferential treatment given constituents of influential Congressmen but denied other veterans. (Appendix C: 1, 2)

b) Preferential treatment given to veterans represented by the NVSOs as opposed to veterans represented by attorneys or self-represented. (Appendix C: 23)

c) Courtesy decisions. (BVA [VA Board of Veterans Appeals] adjudicators signing off on cases never read) to enhance bonus prospects. (Appendix C: 5, 6, 56, 57)

d) Productivity bonuses and awards based upon the adjudication of 40 - 80 claims per week. (Appendix C: 6, 8, 11, 18, 19, 20, 55, 57)

e) Medical decisions (denials) made at the rate of one per minute without regard to the facts. (Appendix C: 11, 6, 26-29)

f) BVA manipulative procedures employed in order to obtain favorable adjudication panels either for or against a disability award, as the circumstances required. (Appendix C: 6, 7, 8, 33, 55, 56, 57, 62, 63)

g) Lack of uniformity in decision making as evidenced by the BVA Chairman Eaton's testimony before the Congress resulting from its failure to codify decisions. (Appendix C: 3, 4, 42, 60)

h) The V.A.'s requirement to assist veterans in the development of their claims is belied by the V.A. General Counsel, Ivers', Congressional testimony advising that the V.A. lacked the resources to assist veterans despite the absence of lawyers and the complexity inherent in the litigation of V.A. claims.

i) Disregard of both the spirit and intent of veterans' laws, requiring the nation "To care for Him who shall have borne the battle, and for his widow, and his orphan" {Abraham Lincoln - Second Inaugural Address, March 1865}.

The above practices, as evidenced in Appendix C, and much more, are violative of the due process and equal protection safeguards guaranteed by the Bill of Rights and as alleged in Petitioner's complaint.

Inexplicably, the 2nd Circuit's Panel neither addressed the equal protection argument nor any of the other allegations contained in the complaint. Yet the 2nd Circuit ruled that the instant action was creatively brought in the guise of a constitutional complaint.

If the complaint and the other submissions were read by the 2nd Circuit Court, it could not have possibly reached its conclusion that the instant challenge was disingenuously cloaked in constitutional terms. How was such a decision reached? No one knows, since the 2nd Circuit either won't or can't explain.

It may very well be that Petitioner's complaint was deficient in some way - as yet unknown to him - but wasn't it the responsibility of the 2nd Circuit to explain without resorting to a blatant distortion of the allegations contained in the complaint? Injustice such as this must not be permitted to stand in a nation of laws, not men.

H. Argument re: Petitioner's Complaint Not Cloaked in the Guise of a Constitutional Complaint

The 2nd Circuit Court panel opines:

> "[T]he courts do not acquire jurisdiction to hear challenges to [veterans'] benefit determinations merely because their challenges are cloaked in constitutional terms." (Emphasis added)

First of all, the Petitioner never asked for the 2nd Circuit to make any determination concerning the validity of his claim - admittedly, the third rail of veterans' jurisprudence. In fact, on pages 3 & 4 of the Complaint, Petitioner put in the following disclaimer:

> "Under no circumstances should this Court construe instant action as one seeking judicial review of Plaintiff's disability claim. Most

assuredly, Plaintiff does not seek judicial review thereof - but rather, looks to this Court to provide constitutional relief from unjust, unconstitutional laws thoughtlessly enacted by Congress - and the unlawful policies, practices and procedures fostered by said laws, hereinafter described, which deny Plaintiff and other veterans a fair and impartial disability hearing.

Nor should this Court regard this matter as Plaintiff's creative endeavor to circumvent case law by litigating his disability claim in the guise of a constitutional complaint. Clearly this is not his intent. Plaintiff seeks no adjudication of his disability claim, no matter how unjustly decided, petitioning solely for judicial redress of the unconstitutional treatment fostered under statutes written and/or as applied.

Any unconstitutional treatment accorded Plaintiff, and the descriptions thereof, relating to his disability claim are not for establishing entitlement to his claim - but rather, to afford this Court an understanding of the substantive abuses inflicted upon disabled veterans under the V.A.'s 'non adversarial' system of injustice."

Under the circumstances, in view of the disclaimer contained in the Petitioner's Complaint, how could the 2nd Circuit possibly conclude, that Plaintiff was seeking judicial review of his disability claim? The 2nd Circuit was repeatedly challenged to tell Petitioner how it arrived at its decision - to no avail. Obviously, said decision was completely at variance with the facts.

Honestly, how could the serious allegations, accompanied by substantial documentation of wrongdoing, as contained in Appendix C, and as alleged in the Complaint, including other submissions, appear disingenuous or cloaked in the guise of a constitutional complaint!!?

If so - then the lack of impartial decision makers, implausible decisions based upon race, equal protection transgressions, and other unconstitutional practices and procedures previously cited to deny veterans fair and impartial claims consideration - must be figments of the Petitioner's imagination. The facts and the evidence submitted in support thereof, say otherwise. Why didn't the 2nd Circuit read the Complaint and the evidence of unconstitutional treatment contained in Appendix C and then address said evidence and advise how this is all a sham and farce? It can't, so it won't.

Moreover, isn't the right to a fair hearing fundamental to our basic freedoms? And if so, shouldn't any complaint armed with the facts and evidence thereof, be seriously considered by this or any other court? And if there be guise involved, surely the Courts are capable of determining same at trial.

Heretofore, the Courts have not even discussed the evidence submitted or even asked a question of either party concerning the validity thereof. Why?

Consider the following examples:

a) Is the failure of the VA to treat all similarly situated veterans equally, of constitutional dimension, or is it a contrivance? (Appendix: C: 1, 2, 23, 49, 50, 59, 60)

b) Are allegations of VA decisions made contrary to the facts and the treating physicians' opinions, in deference to the budgetary constraints imposed by OMB - of constitutional dimension, or is it a contrivance? (Appendix: C: 26-29)

c) Are decisions based upon race, of constitutional dimension, or is it a contrivance? (Appendix: C: 43, 44)

d) Are the VA's practices and procedures, which creatively deny hearings to veterans on one fraudulent basis or another, of constitutional

dimension - or is it merely a contrivance? (Appendix: C: 31, 33, 34)

e) inter alia.

To be sure the Complaint's allegations, and the evidence in support thereof, as contained in Appendix C, are no pipe dream and reflect the real world of veterans VA jurisprudence. A world, no Article III Court has heretofore explored. Aren't veterans entitled to at least that much consideration from this Court? Isn't it time some Article III Court examined the evidence and learned what a constitutional morass really looks like? If it did, it would learn that this matter is of considerable constitutional dimension - and certainly not cloaked in the guise of a constitutional complaint.

How the lower Court could have arrived at its "guise" opinion is a mystery defying comprehension. Conspicuously without merit, unequivocally contrary to the facts thereof, and clearly without precedent. An atrocious miscarriage of justice which cries out for reversal on every ground deemed sacred under our system of jurisprudence.

I. Argument re: <u>Equal Protection</u> - 2nd Circuit's Reluctance to Address

In its decision, the 2nd Circuit totally ignored the Petitioner's equal protection argument - and why? The evidence thereof is overwhelming - for example:

a) The preferential signature list established by the V.A.'s Board of Appeals which provided an extra level of review for constituents of those influential Congressmen whose names appeared thereon. (Appendix: C: 1, 2)

b) Identical cases decided differently - lack of codification or worse. (Appendix: C: 33, 34)

c) Preferential access accorded to the National Veterans Service Organizations, (NVSOs) but denied

to Pro Se veterans or veterans with pro bono attorneys. (Appendix: C: 23)

d) Mississippi veterans accorded more than twice the benefits of veterans residing elsewhere due to the influence of HVAC Chairman "Sonny" Montgomery (D. Miss) despite Mississippi's having the poorest record of military service of any State in the Union. (Appendix: C: 49, 50)

e) Traveling board hearings were provided to NVSO represented cases, but surreptitiously denied pro se veterans or those with pro bono attorneys. (Appendix: C: 33, 34) The importance of veterans attending such hearings cannot be overblown, since said veterans enjoy a greater degree of success than those who do not.

f) inter alia.

Although the petitioner has provided sufficient evidence to support an equal protection complaint, the 2nd Circuit has not ruled on this matter or taken any notice thereof. Why? For the sake of its integrity, this omission should have been remedied by the lower Courts, and must now be addressed by this Court in the context of reinstating the instant action.

J. Argument re: Separation of Powers Doctrine

Veterans' law, under the finality clause contained in 38 U.S.C. § 211 (a), permits the V.A. to be rule giver, judge, jury, and executioner, pursuant to veterans' disability claims administered totally under the Executive Branch or Article 1 auspices. The V.A. makes the rules, interprets the rules, renders the decisions, judges the appeals - and is free to do anything it chooses, while the 2nd Circuit keeps its distance and won't permit veterans to enter, no matter the circumstances, under one pretext or another.

Now, clearly, the "Framers" never intended for their carefully constructed system of checks and

balances to be so flagrantly disregarded by laws such as 38 U.S.C. § 211(a), as enacted by Congress.

Moreover, the Framers clearly understood what would happen - if and when - the checks and balances, imposed under its carefully drawn Constitution, were dismantled under one statutory scheme or another.

For example, James Madison wrote in Federalist Papers #47, (January 30, 1788): "that the accumulation of all powers, legislative, executive, and judiciary in the same hands may justly be pronounced as the very definition of tyranny."

Madison again, in the same Federalist Papers quoted Montesquieu who said: "there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates."

Alexander Hamilton, expressed the importance of the separation of powers doctrine by writing in Federalist papers #78 (May 28th, 1788): " . . . there is no liberty, if the power of judging be not separated from the legislative and executive powers."

Madison quoting Thomas Jefferson in Federalist papers #48 (February 1, 1788) wrote: "All powers of the government legislative, executive and judiciary residing in the same hands is precisely the definition of despotic government."

Obviously, some of the Framers knew over two hundred years ago, what would be the likely result, once unbridled power was placed in the hands of an all powerful bureaucracy. None of them would be surprised over the tyranny being inflicted upon helpless veterans whose only crime was to be injured in the defense of liberty.

By way of further explanation, the Petitioner submits that unlawful VA policies, practices and procedures, are clandestinely structured to cause veterans (tens of thousands) to abandon valid claims in utter confusion, frustration and despair - or failing in that objective - to hold hearings and render

implausible decisions which make a mockery of impartiality, due process, relevant statutes, CFR regulations, case law, and the Bill of Rights.

Simply put, the Petitioner and other veterans can't get a fair and impartial hearing re their disability claims due to budgetary constraints imposed by the Office of Management and Budget (OMB) - and because they have been stripped of their right to judicial review and meaningful legal representation permitting redress thereof in Article III courts.

Moreover, Petitioner asserts that the lack of judicial review [38 U.S.C. § 211(a)]; the unfettered right to retain an attorney 38 U.S.C. § 3404(c) [now 38 U.S.C. 5904(c)], and other statutes heretofore mentioned, fosters a climate of unconstitutionality resulting in "sub rosa" unpublished policies, practices and procedures evidencing flagrant VA abuse -- more egregious than those practices uncovered in the findings re City of New York v. Heckler, 578 F. Supp. 1109 (1984) which culminated in the unanimous U.S. Supreme Court holding condemning such practices in Bowen v. The City of New York, 476 U.S. 467 (1986).

K. Further Discussion re: Separation of Powers

Disabled American Veterans [DAV] v. U.S. Department of Veterans Affairs, 783 F. Supp. 187 (S.D.N.Y. 1992) was a class action suit brought to contest the validity of 38 U.S.C. § 3205 (now § 5505). The DAV contended that the aforesaid section was facially unconstitutional in that it denies them equal protection and due process of law in violation of the U.S. 5th Amendment.

At 194, the VA argued that a recent amendment to § 211(a) of title 38 vests exclusive jurisdiction over this controversy in the newly created U.S. Court of Veterans Appeals (COVA -- an Article 1 court) and deprives Article III Courts of jurisdiction to hear a

facial constitutional challenge to federal statutes administered by the VA. The VA contends that the plain language of section § 211(a), "read in pari materia with 38 U.S.C. §§ 4061 and 4092 [precludes plaintiffs] from maintaining this action in this Court."

The DAV court held that the "VA's motion does not raise a serious jurisdictional challenge." However, under similar circumstances what would another Circuit hold considering that many Circuits extend extraordinary deference to VA wishes and since the Circuits are all over the lot re Veterans' law.

Consequently, DAV raises still another reason for this Court to define what veterans' laws mean in substantial terms so that much needless confusion and litigation may be avoided.

L. Argument re: COVA Chief Judge Nebeker's Criticism of the V.A.'s Refusal to Follow Its Decisions/The Rule of Law

It is particularly instructive for this Court to learn what Chief Judge Frank Q. Nebeker of the Court of Veterans Appeals (COVA) thinks of the VA's compliance with COVA's decisions (after 7 years) and why its absolutely essential to contemplate the restoration of constitutional law to veterans jurisprudence.

At COVA's Third Judicial Conference (10/17/94), Chief Judge Nebeker criticized the VA sharply for deliberately ignoring COVA's rulings and/or decisions pursuant to veterans disability claims. He further expanded on his remarks by accusing "the Veterans Benefits Administration of systematically ignoring the law and the court."

Additionally charging that the policy set by the statutes and regulations is "freely ignored by many initial adjudicators whose attitude is: "I haven't been told by my boss to change, if you don't like it - appeal it." Deploring the conduct of the Regional

Offices, Chief Judge Nebeker described their attitude as: "I don't care what the Court says the law is; I care only what my boss says it is."

Moreover, he commented upon the rate of adjudication error as being far too high for a healthy system. That's just polite inside the beltway language for "this system stinks!" However, this has been so for well over 50 years, while the entire body politic and the Courts paid no attention to the veterans pleas for relief.

Earlier in his tenure as Chief Judge, Judge Nebeker had pointed out that veterans' law was terribly complicated and that veterans were largely unable to secure the services of an attorney - and absent such representation, there was very little chance they could prevail. The lack of attorney interest stemmed from the big chill cast by the ten dollar fee limitation, the complexity of veterans law and the difficulty of practicing in Washington, D.C. - hundreds, and often thousands of miles away from veteran litigants.

After 7 years, Chief Judge Nebeker finally got the message. The VA has no intention of following Court decisions, laws, regulations - only their own unbridled - no holds barred "hidden agenda". Unfortunately, COVA has no power over the VA. There is absolutely nothing COVA can do to enforce its decisions.[2] Read the law for confirmation thereof.

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2 COVA doesn't make many definitive decisions; 50 out of 100 cases are simply remanded to the VA for disposition. What we have are BVA decisions (appellate) being reviewed by COVA (appellate) and later by CAFC (appellate). In baseball parlance: Tinkers to Evers to No Chance. Actually, COVA has no power, while CAFC has little or no jurisdiction. CAFC's jurisdiction is so limited that it's virtually impossible to thread the eye of its jurisdictional needle.

Only genuine judicial review will serve to keep the VA scoundrels honest. Nothing else will do.

Accordingly, what can powerless veterans do, except bring an action to declare unconstitutional, laws which foster the VA's criminal conduct. Still the U.S. Department of Justice won't investigate and Congress won't meaningfully exercise its oversight responsibilities.

III Summary

Most extraordinary circumstances require this Court to reinstate the instant action. The 2nd Circuit's Court of Appeals decision is contrary to all of the allegations, facts and controlling case law pursuant to veterans jurisprudence.

The 2nd Circuit Court of Appeals must now be reversed for the following reasons:

1. Disregarded the Johnson v. Robison Supreme Court decision requiring the courts to take jurisdiction over veterans challenges to the operation of the V.A.'s claims system, notwithstanding 38 U.S.C. § 211(a).

2. Disregarded the Walters v. NARS decision, 473 U.S. 305, 311 n.3 (1985) in which the Supreme court construed 38 U.S.C. § 211(a) as permitting a facial challenge to procedural provisions of the statute that allegedly denied due process, advising that:

> "The district Courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems." (emphasis added)

3. Likewise disregarded Supreme Court decisions in Traynor v. Turnage and Bowen v. The City of New York, 476 U.S. 467 (1986).

4. Disregarded the Goldberg v. Kelly Supreme Court decision which describes in detail the hearing procedures required to ensure due process; little or none of which were available to Petitioner (and other

veterans) as alleged in the Complaint and/or other submissions.

5. Disregarded the 7th Circuit's Marozsan v. U.S. (en banc) (1988) decision to include numerous other circuit courts' holdings which permit a constitutional attack on the operation of the VA's claim system, and which require a review of the policies, practices, and procedures employed by the VA as part and parcel of the challenge to the operation of the VA claims system.

6. Disregarded the prior 2nd Circuit Social Security decisions, in the City of New York v. Heckler and the unanimous Supreme Court decision in Bowen, which held that the social security agency's "sub rosa" policies, practices and procedures were subject to court challenge and which upon review thereof were found to be impermissible.

By denying similar treatment and/or the right to litigate this Petitioner's allegations re the VA's unlawful "sub rosa" policies, practices and procedures - Bowen has been rendered inoperative - with respect to veterans, unless the instant decision is overturned. No explanation has been forthcoming from the 2nd Circuit explaining why similar veterans' allegations are being denied judicial review and treated differently from those of social security - especially after the Supreme Court has ruled in Walters v. NARS that veterans entitlements are akin to those of Social Security.

What is the law of the 2nd Circuit regarding the V.A.'s unlawful "sub rosa" policies, practices and procedures which in their totality deny veterans a fair and impartial hearing? And if Social Security recipients can litigate such issues in the 2nd Circuit, why can't veterans similarly affected?

7. Disregarded the requirements under a dismissal motion, to consider Petitioner's complaint and the allegations contained therein, as true - and considered in their most favorable light, not the reverse.

8. Disregarded Petitioner's equal protection allegations under the 5th Amendment, which is not so easily dismissed since it is not held hostage to the onerous veterans' laws. That fact alone may explain why the 2nd Circuit failed to address said issue.

By which court decision, under which provision of law, or under which circumstance are veterans denied equal protection? And if there is no applicable statute or case law, under what circumstances was Petitioner thrown out of court while his equal protection allegations were not addressed, much less considered.

Under the equal protection argument, it simply doesn't matter whether the veteran received due process or not, or whether the VA has a budgetary driven quota system or not, or whether the VA operates under illegal sub rosa policies, practices and procedures or not. What does matter, however, is whether the plaintiff was treated equally with the veterans of Mississippi and Arkansas; or whether he was denied equal informal access to the VA's adjudicatory personnel; or whether petitioner was treated equally with the constituents of the 12 Congressmen and Senators named on the BVA's secret preferential signature list, by which such veterans were singled out for favored treatment; or whether due to the lack of codification of VA cases, Petitioner and other veterans were treated equally with other similarly situated veterans.

Under such circumstances, plaintiff can find no prohibition against litigating the equal protection allegations. How did the 2nd Circuit address this issue? Plaintiff does not know since the 2nd Circuit has not spoken to this issue - and why?

Accordingly, what does the 2nd Circuit hold? Is it possible that no veteran, whatever the circumstances, is entitled to equal protection under the 5th amendment? Or is there some other basis to deny jurisdiction, yet unwritten or unspoken?

Failure to rule on the Petitioner's equal protection allegations casts still further doubt on the fairness and objectivity heretofore exhibited in the 2nd Circuit pursuant to the instant matter and veterans' litigation in general.

IV Conclusion

There is no lack of subject matter jurisdiction since neither monetary relief nor judicial review is requested pursuant to the merits re Petitioner's disability claim; there are no grounds to assert that a facial attack was not mounted against the constitutionality of many of the veterans' statutes; there is no basis to ignore the separation of powers concept contained within the Constitution, since a statute cannot amend the Constitution; there is no guise associated with the instant constitutional complaint; there is no statutory or case law precluding an attack on the operation of the VA's claim system; there is no reason for the 2nd Circuit Court's failure to address the equal protection arguments advanced; nor is there any basis for the Second Circuit's rejection of controlling case law without any explanation thereof; inter alia.

In view of the foregoing, Petitioner respectfully requests that this case be returned to the Brooklyn Eastern District Court, under another judge, for the express purpose of establishing the validity of the allegations cited in Petitioner's Complaint.[3]

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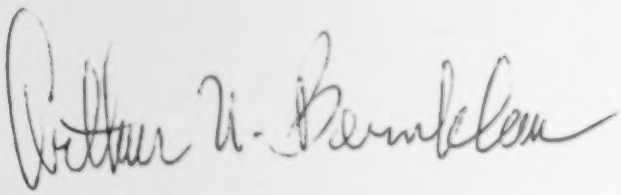
[3] If Petitioner's request for relief is favorably considered, he will, with the aid of Veterans Due Process, Inc., convert this matter into a class action suit by retaining the services of an attorney well versed in Veterans' law.

DATED this 26th day of August, 1996

Respectfully submitted,



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APPENDIX

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14. Statement of Kenneth T. Blaylock, dated National President, American Federation of Government Employees, dated November 19, 1979, at a hearing before the Subcommittee on Special Investigations of the Committee on Veterans' Affairs, United States House of Representatives, 96th Congress, 2nd Session, concerning VA Judicial Review of veterans claims. Issues:

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ORDER on Petition for Rehearing and suggestion for Rehearing In Banc, United States Court of Appeals for the Second Circuit, June 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Court House
40 Foley Square
New York 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of June, one thousand nine hundred and ninety-six.

Bernklau,

Plaintiff-Appellant

v. Dkt No: 95-6134

USA

Appellee-Defendant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Arthur N. Bernklau.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that

heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By:
Beth J. Meador,
Administrative Attorney

SUMMARY ORDER on appeal, United States Court of Appeals for the Second Circuit, March 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of March, one thousand nine hundred and ninety-six.

PRESENT: HONORABLE J. DANIEL MAHONEY,
HONORABLE JOSEPH M. McLAUGHLIN
HONORABLE GUIDO CALABRESI,

Circuit Judges.

ARTHUR N. BERNKLAU,
Plaintiff-Appellant,

v.

No. 95-6134

UNITED STATES OF AMERICA,
Defendant-Appellee,

APPEARING FOR APPELLANT: Arthur N. Bernklau
New York, New York, pro se.

APPEARING FOR APPELLEE: Richard K. Hayes,
Assistant United States Attorney
for the Eastern District of New
York, Brooklyn, New York.

Appeal from the United States District Court for the Eastern District of New York (Reena Raggi, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

1. Plaintiff-appellant Arthur N. Bernklau appeals pro se from an award of summary judgment that dismissed his complaint seeking a declaration of unconstitutionality "as written or applied" with respect to numerous statutory provisions of federal law relating to veterans' affairs. Bernklau contends that these provisions foster "sub rosa" policies and practices of the Department of Veterans Affairs that violate veterans' First and Fifth Amendment rights to due process, equal protection, and meaningful representation.

2. A district court has jurisdiction only "to hear facial challenges of legislation affecting veterans benefits." Larrabee by Jones v. Derwinski, 968 F.2d 1497, 1501 (2d Cir. 1992) (quoting Disabled Am.

Veterans v. United States Dep't of Veterans Affairs, 962 F.2d 136, 140 (2d Cir. 1992) (emphasis added in Larrabee). Because the district court correctly concluded that Bernklau's complaint constituted "a challenge to how the Veterans Administration operate[s], not to the statute[s] on [their face]," we affirm the judgment of the district court substantially for the reasons set forth on the record below. See Bernklau v. United States, No. CV 93-2675 (S.D.N.Y. May 19, 1995) (bench ruling); cf. Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994) ("[T]he courts do not acquire jurisdiction to hear challenges to [veterans'] benefits determinations merely because those challenges are cloaked in constitutional terms."), cert. denied, 115 S.Ct. 2245 (1995). We note that because the district court dismissed for want of subject matter jurisdiction, the dismissal does not constitute an adjudication on the merits. See Fed. R. Civ. P. 41(b).

Hon. J. Daniel Mahoney, U.S.C.J.
Hon. Joseph M. McLaughlin, U.S.C.J.
Hon. Guido Calabresi, U.S.C.J.

JUDGMENT, United States District Court, Eastern District of New York, dated May 25, 1995.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ARTHUR N. BERNKLAU,
Plaintiff

-against-

JUDGMENT
93-CV-2675 (RR)

UNITED STATES OF AMERICA, et al.,
Defendants.

----------x

An order of Honorable Reena Raggi, United States District Judge, having been filed on May 25, 1995, for the reasons stated on the record of oral argument held on May 19, 1995, granting defendants' motion for summary judgment and closing the case, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; and that defendants' motion for summary judgment is granted.

Dated: Brooklyn, New York
May 25, 1995

ROBERT C. HEINEMANN
Clerk of Court

• PAGE #4 FROM TRANSCRIPT OF "ORAL ARGUMENT" HEARING, CONDUCTED MAY 19, 1995 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

Bernklau v. United States of America

THE COURT:	Please.
MR. BERNKLAU:	Okay. The Plaintiff does take exception to all the defendant's facts.
THE COURT:	Well, let's deal with that legal question about whether this is the right court to even hear a challenge such as you're bringing.
MR. BERNKLAU:	Have you read the Marizon (Ph) *(Marozsan v. United States: 852 F.2d 1469 - 7th Circuit En Banc - 1988)* case, your Honor?
THE COURT:	Yes, sir, the Seventh Circuit case.
MR. BERNKLAU:	It's a Seventh Circuit. That's true.
THE COURT:	Right. But it's after that case was decided that the statute dealing with the veterans – with the court for the Federal Circuit was passed.
MR. BERNKLAU:	Okay.
THE COURT:	It was before the passage of the Veterans Judicial Review Act that Marizon was written.
MR. BERNKLAU:	I am asking for constitutional relief. I'm not asking for anything to do with my claim.

THE COURT: Specifically what constitutional relief are you asking for, Mr. Bernklau, because I want to be sure I understand it?

MR. BERNKLAU: The way the -- the complaint. The way the government handles veteran's complaints.

THE COURT: But you see, specifically the Act

CONSTITUTION

- **First Amendment:**

  "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for redress of just grievances."

- **Fifth Amendment:**

  "No person shall be held to answer for a capital, or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES

- 38 U.S.C. §211(a) (1979) [PRIOR TO 1988 Veterans Judicial Review Act (VJRA)]:

  "On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

- 38 U.S.C. §511(a) (1992) [§ 211(A) AFTER 1988 VJRA]:

  "(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

  (b) The second sentence of subsection (a) does not apply to --

(1) matters subject to section 502 of this title{§ 502: *Judicial Review of Rules & Regulations*}

(2) matters covered by sections 1975 and 1984 of this title; {§ *1975 & 1984*}

(3) matters arising under chapter 37 of this title; and {*Chapter 37: Housing and Small Business Loans*}

(4) matters covered by chapter 72 of this title." {*Chapter 72: United States Court of Veterans Appeals*}

- **38 U.S.C. §3402(a)(2) [now § 5902(a)(2)]**

"The Secretary **may**, in the discretion of the Secretary, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized." {*emphasis added*}

{§ 5902(a)(2) - 1992}

- **38 U.S.C. §3404(c) - *1862-1988* {now § 5904(c)(1) & (2)} [PRIOR TO 1988 VJRA] ---:**

"The **Administrator shall determine and pay fees to** agents or **attorneys** recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees-

(1) shall be determined and paid as prescribed by the Administrator;

(2) **shall not exceed $10 * with respect to any one claim**; and

(3) shall be deducted from monetary benefits claimed and allowed."

* Civil War Statute *Enacted: July 14, 1862: (Chapter 166) as $5.00 limitation on total attorney fees*

- **38 U.S.C. §3404(c) {now § 5904(c)(1) & (2)} AFTER 1988 VJRA] -- Total attorney fee prohibition:**

"In connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, **a fee may *not* be charged, allowed, or paid for services of** agents and **attorneys** with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case. Such a fee may be charged, only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court." *{emphasis added}*

{§ 5904(c)(1)}

- **38 U.S.C. §3405 [now § 5905]**

"Whoever (1) directly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 5904 pr 1984 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, **shall be fined as provided in title 18,** or imprisoned not more than one year, or both." *{emphasis added}*

{§ 5905}

- **38 U.S.C. §7251 (1992) - 1988 Veterans Judicial Review Act (VJRA)**

  "There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals."

- **38 U.S.C. §7255 (1992)**

  "The principal office of the Court of Veterans Appeals shall be in the District of Columbia, but the Court may sit at any place within the United States."

- **38 U.S.C. §7292 (1992)**

  "(a) After a decision of the United States Court of Veterans Appeals if entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to the United States courts of appeals for the United States district courts.

  (b)(1) When a judge or panel of the Court of Veterans Appeals, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is in fact a disagreement between the appellant and

the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Veterans Appeals. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Veterans Appeals, unless a stay is ordered by a judge of the Court of Veterans Appeals or by the Court of Appeals for the Federal Circuit.

(2) For the purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Veterans Appeals.

(c) the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and <u>to interpret constitutional and statutory provisions</u>, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, **including interpreting constitutional and statutory provisions**. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) **without observance of procedure required by law**.

(2) **Except to the extent that an appeal under this chapter presents a constitutional issue**, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Veterans Appeals is not in accordance with law, to modify or reverse the decision of the Court of Veterans Appeals or to remand the matter, as appropriate.

(2) rules for review of decisions of the Court of Veterans Appeals shall be those prescribed by the Supreme Court under section 2072 of title 28."

PERSONAL SIGNATURE LIST" OF CHAIRMAN KENNETH E. EATON, BOARD OF VETERANS APPEALS:

"Office of the Chairman
Board of Veterans Appeals
Washington, D.C. 20420

March 9, 1987

"MEMORANDUM
No. 01-87-10

Subj: Chairman's Personal Signature List

1. PROCEDURE

When the following persons have expressed an interest in a case, and correspondence is being directed to the Capitol Hill offices, the case, after processing through AIRS and prior to dating and dispatch of correspondence will be routed through the Chairman's office to the Executive Assistant for review and signature. Where a letter is being sent to the district offices, it should not be sent to the Executive Assistant but rather should be signed by the Chief of the Section preparing the correspondence, e.g., Chief, Special Correspondence and Inquiries Section; Chief, Hearing Section.

2. COMPOSITION

The Chairman's personal signature list will be composed of the following Senators and Congressmen.

Senators

Alan Cranston, Chairman
Senate Veterans' Affairs Committee
Frank H. Murkowski

Alan K. Simpson
Mark O. Hatfield
Thomas A. Daschle

CONGRESSMEN

G.V. Montgomery, Chairman,
House Veterans' Affairs Committee
Gerald B. H. Solomon
John Paul Hammerschmidt
Jim Wright, Speaker of the House
Denny Smith
Douglas Applegate
Don Edwards

3. RECISSION

a. Chairman's Memorandum No. 01-85-24, dated September 27, 1985, subject: Chairman's Personal Signature List, is hereby rescinded.

b. This memorandum is automatically rescinded December 31, 1987.

KENNETH E. EATON
Chairman"

{BOLD PRINT EMPHASIS ADDED}

STATEMENT PRESENTED BY RICHARD E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF COMMITTEE ON ADVOCACY, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, ENTITLED: "VA APPELLATE ADJUDICATIONS AT THE BOARD OF VETERANS APPEALS", BEFORE THE HOUSE OF REPRESENTATIVES, HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HEARING CONCERNING "OVERSIGHT OF VA'S DISABILITY COMPENSATION PROGRAMS". HEARING BOOK PAGES 95 THROUGH 195.

{***** Statement page 5} **"Significant Variances Between Different Sections of the BVA**

"Kenneth E. Eaton, Chairman of the Board of Veterans Appeals, testified at an oversight hearing on the operation of the BVA before the Subcommittee on Compensation, Pension and Insurance of the House Committee on Veterans Affairs in 1985 and again on October 6, 1987. Mr. Eaton, responded to a question from Chairman Applegate in 1985 by saying "[y]es, indeed, it is quite true that there is what I might say is a significant variance between different sections of the Board and how they see these cases. . . ". The VVA and the American Legion have each, in the past, pointed out similar problems (Exhibit C, footnote 3 {***** **omitted})**

During the 1985 and 1987 hearings when Mr. Eaton testified, it would have been very helpful if production statistics for each of the 21 sections of the BVA had been available. These production statistics

show allowance rates, denial rates and remand rates for each of the Board's 21 sections. Had they been available they would likely have shown substantial differences in allowance rates, denial rates and remand rates between certain sections of the Board that handle similar cases.

"The VVA has obtained one such document from sources within the BVA and, indeed the differences we have suspected are apparent. Allowances overall for the last quarter of FY 1987 for all Board sections ranged between 7.9 percent and 18.6 percent. Denials overall for the same quarter ranged between 55.6 percent and 82 percent. Remands ranged between 6.9 percent and 31.6 percent (Exhibit D {***** **omitted**}). The VVA believes the variations in these production statistics show that the testimony of the Chairman of the BVA regarding the "significant variances between different sections of the Board is indeed very significant. It is so significant, in our judgment, that it has become apparent that a higher reviewing authority ought to be made available on this basis alone in order to protect veterans from those "variances" in the decisions rendered on veterans benefits.

Moreover, not only are there variances in the decisions of the Board's sections, but equal and even identical cases are decided differently (Exhibit C, pg. 7 {***** **omitted**}). This fact, attested to the BVA Chairman, stands in direct violation of federal regulation, 38 CFR 3.101 (Exhibit E {***** **omitted**})."

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{Statement page 11} "An interesting corralary to the production credit limits in cases involving multiple issues is the affect additional credits in

individual cases might have on overall BVA allowance rates. Over many years the BVA annually has approved about 13 percent of the appeals adjudicated. This rate has remained so constant over the years that it has come to be termed "the quota" in some circles. If production credits were given for each issue decided in each case by the BVA, it is likely that allowance rates would decline precipitously as denials soared.

Indeed the VA's Veterans Appeals Control and Locator System (VACOLS) which provides statistical information on allowances and denials "is blind to the reasoning behind any individual decision. If, in a four issue appeal, three issues are denied and one issue is allowed, the VACOLS record will regard the BVA decision as an allowance." (Exhibit L, pg 2 - {***** **omitted**}).

Moreover, if it is conservatively estimated that the typical appeal at the BVA contains three issues and if it is assumed that two of the three are disallowed, the annual allowance rate would decline two thirds from approximately 13 percent to 4.3 percent. *****

{***** Statement page 15} **"Courtesy Sign-Offs**

"Another potential byproduct of production pressure and bonus incentives is particularly troubling. This is the practice of some Board members in signing off on a claim decision without even reviewing the file. The danger for veterans is one of being denied due process as prescribed by the laws governing the way appeals are supposed to be adjudicated.

"The May 11, 1987 Informal Grievance cited earlier in this statement (Exhibit J, pg 2 {***** omitted}) discusses courtesy sign-offs as follows: "Another, and perhaps the most serious manipulative method of exploiting the current system is by obtaining signatures on decisions by Board Members (or Acting Board Members) who sign the decisions despite not having reviewed the case. This so-called 'courtesy' system not only deprives claimants from a review to which they would otherwise be entitled, but is also used to artifically increase the production of decisions. We need not identify those sections that regularly engage in this practice because their identity is well known to the Deputy Vice Chairmen who review their decisions.

"With regard to the same system of 'courtesies' any section member can give an 'in house courtesy' signature, thereby accomplishing the same result as obtaining a 'courtesy' signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for proper adjudication of claims.

"The undersigned are of the opinion that the pressures to meet goals or quotas (or even to increase allowance rates) are illegal."

"We find it particularly troubling that the "courtesy" is frequently exercised by the physician member." *****

{Statement page 21} "The writer goes on to say "[a]ll promotions, bonuses and other rewards are based almost exclusively on productivity, with only lip service being paid to quality. Sections are in

competition with each other for a yearly bonus, which is paid to the sections with the highest productivity over the year, with the largest share going to the Chief Member. This encourages the Chief Member of each section to focus on getting the cases out, so to speak, regardless of quality or whether a fair result is reached in the case or not. (The Chief Member of the section I was in at the time of my retirement, although a decent person overall, did not view favorably my dissents in favor of the veteran or other claimant, which he felt slowed down the productivity of the section and impaired his chances for the yearly bonus . . . It is my belief, based on my 20 years' experience with the BVA, that the agency is not discharging its duties and responsibilities toward the veterans of this nation and their survivors, in the spirit which Congress intended and that judicial review of BVA decisions, and lifting of the $10 limitation on attorneys' fees, would greatly benefit veterans and other claimants for Veterans Administration benefits. In my judgment, the Vice Chairman and most board members, whether law members or medical members, have an anti-claimant orientation, and little sympathy for the veterans' benefits program, which they view as a huge give-away. This view colors the decisions they reach on the cases before them. (Soon after I became a board member, I was called in by the Vice-Chairman, as a result of a dispute I was having with the Deputy Vice Chairman, in charge of one-half of the board to which my section was assigned, and <u>was told by the Vice Chairman that I was too allowance-prone, and that it was preferable to deny a case, when it doubt, than to allow it, as a denial always had a chance of being reversed later, whereas an allowance was final</u>.) . . . Most board members, in my judgment, pay only lip service to the and regulations,

disregarding those with which they are not in sympathy in order to reach the result they favor in the particular case . . . Some of the most anti-veteran, pro-denial Chief Members, with the lowest allowance statistics year after year, end up getting the largest bonus year after year, based on their production statistics."

(EMPHASIS ADDED)

ANONYMOUS "DEEP THROAT" TYPE LETTER RECEIVED BY MR. GORDON P. ERSPAMER (LEAD NARS ATTORNEY IN NARS V. WALTERS -- CASE NO. C-83-1861-MHP, N.D. CALIFORNIA). SAID LETTER WAS SUBMITTED AS "EXHIBIT E" (SEE HEARING BOOK PAGES 310 THROUGH 312) IN THE PREPARED STATEMENT (SEE HEARING BOOK PAGES 292 THROUGH 326) OF PHILIP E. CUSHMAN, PRESIDENT, VETERANS DUE PROCESS, INC. (VDP), BEFORE A JUNE 25, 1986, HEARING OF THE COMMITTEE ON VETERANS' AFFAIRS, HOUSE OF REPRESENTATIVES, NINETY-NINTH CONGRESS, SECOND SESSION, HEARING BOOK VOLUME II, SERIAL NO. 99-54

"May 29, 1986

"Gordon Erspamer, J.D.
NARS Advisory Board
78 El Camino Real
Berkley, CA 94705

Dear Mr. Erspamer:

"Your statement before the House Veterans Affairs Committee on May 20, 1986, was accurate and true. The Veterans Administration does not systematically provide veterans with adequate due process, especially for those claims disallowed for failure to submit requested evidence. Instead, those who manage adjudicative actions encourage premature denial of claims without notice in order to statistically enhance the data that measures the timeliness of claims processing. Managers of adjudication receive work credit for the volume of cases produced. If for example, end product controls are prematurely cancelled or recorded, the same credit can be received for working one claim four times as for working four claims. These managers

are then rewarded by both additional staffing and monetary bonuses under merit pay.

Your prepared statement includes a memorandum (Exhibit A) from T.A. Verrill, Adjudication Officer at the V.A. Regional Office, San Francisco. Mr. Verrill has been repeatedly warned by Central Office about encouraging his staff to prematurely disallow claims before addressing the issues claimed and was forced to appear in court to defend his policy of discouraging hearings to claimants. Central Office has chosen to ignore these repeated offenses and has in fact rewarded him with an exceptional evaluation and a bonus under merit pay. This award was fully concurred in and encouraged by officials at Central Office.

In many instances, this office, as well as some other offices, including: Washington Regional Office, St. Petersburg, Philadelphia, Baltimore, Los Angeles, and Winston Salem have been found to repeatedly "administratively" deny claims without proper processing. In many instances, a copy of the development letter requesting evidence is never placed in file, yet the claimant is disallowed for not replying to the request. Often, the evidence was not actually requested. This type of failure is considered only procedural in nature and is not counted as a substantive error against the station. On several occassions this was brought to the attention of the Compensation and Pension Director. In addition, there have been instances when several items of evidence have been requested. If some, but not all, of the evidence requested is received, some stations will disallow the claim without notice for failure to submit requested evidence. Confirmation of these facts can be found by making a Freedom of Information (FOIA) request to Central Office to obtain from the Compensation and Pension Field

Operations Section, a summary of the quality review and the specific claim numbers for cases involving error codes 15, 33, 52a and 54. These are maintained in the station quality review file as well as the station general operating file. The information regarding type of errors is also maintained on a personal computer by the Systematic Quality Control (SQC) section of Field Operations.

Both the regional office claims examiners and rating board specialists are often required to process 20 or more final actions daily. This means a person must process more that {sic} two cases per hour. The number is left up to the management of each regional office.

In order to operate with reduced staffing, many regional offices no longer employ full time doctors for the rating board. Instead a part-time doctor is borrowed from a local medical center one to two times a week to sign his name to the accumulated rating decisions. He may spend one minute or less on each decision. This information can be confirmed by requesting the performance standards for regional office employees to include Claims Examiners, GS-9-11 and Rating Specialists GS-12. Information regarding regional office staffing in the adjudication division can be obtained from the Compensation and Pension Service at VA Central Office."

{EMPHASIS ADDED}

"DEEP THROAT" LETTER #2, RECEIVED BY MR. GORDON ERSPAMER, LEAD ATTORNEY IN NARS V. TURNAGE (CASE# C-83-1861-MHP), CONCERNING INTERROGATORIES SENT TO THE VETERANS ADMINISTRATION PURSUANT TO SAID ACTION. {NOTE: THIS LETTER PROVIDED BASIS FOR COURT INVESTIGATION RE DESTRUCTION OF DUE PROCESS DOCUMENTS REQUIRED UNDER COURT ORDER. SAID INVESTIGATION RESULTED IN FINES TO THE VA OF $120,000., REQUIRED COURT APPOINTMENT OF A SPECIAL MASTER TO ENSURE COMPLIANCE WITH FUTURE COURT ORDERS}

"July 11, 1986

"Gordon Erspamer, J.D.
NARS Advisory Board
78 El Camino Real
Berkeley, CA 94705

Dear Mr. Erspamer:

"Your interrogatories recently sent to the Veterans Administration have been received. You are heading in the right direction. However, there is a conspiracy by the supervisors of the Field Operations Staff in the Compensation and Pension Service to deny you the information requested. If you do not specifically name the correct form or record, they intend to indicate they have no record.

You should ask for specific error exceptions called. These are held for 2 years and are contained on form 20-6567a-21. A copy of the form along with a sample is enclosed. You should ask for any and all exception sheets that contain errors under the specific error codes your interrogarory {sic} requested. The SQC history file contains these exception sheets for

all stations. The sheets contain the name of the office, the name of the veteran and the claim number of the veteran. There is also a series of letters written to stations which document specific errors in due process and case control. You may wish to ask for all error sheets and letters concerning due process and case (claims) control for as far back as these errors have been kept.

Approximately 2 weeks ago, Michael Dunlap, the supervisor of Field Operations, ordered the consultants to purge the station files of derogatory information about the stations as well as the Adjudication Officers. Included in the purge was information received from San Francisco Regional Office employees about T.A. Verrill, Adjudication Officer of that office. The staff consultants of the Field Operations Staff purged the files. However, you may ask for station visit reports and station history files. The periodic station analysis are held in the official station history files for 2 years and held indefinitely in the unofficial brown history file. You should request both station visit reports and staff analyses for 8 stations since January 1982 to present. These records along with SQC records are also maintained at each regional office.

It should be also noted that a legal consultant, Ronald Abrams, wrote several papers on due process problems found at field stations that have been given to the Director of Compensation and Pension Serivce (sic), Gerald P. Moore. These should be requested. In addition, Ronald Abrams wrote a memorandum to Gerald Moore indicating a serious due process problem and Central Office failure to take the problem seriously. This memorandum was destroyed by Michael Dunlap, the supervisor of the Field Operations Staff without being forwarded to the Director of the Service. Mr. Moore did indicate to a

consultant, Mr. John Smith, who is now the Adjudication officer at the Hartford, CT Regional Office, that on the staff visit to Washington Regional Office, no due process problems should be identified.

You may wish to request the performance standards for each Adjudication Officer. You will note that there is no uniformity in the performance standards. This means that each office has its own quality standard. The Adjudication Officer is not responsible to any central authority, but to his own station director."

(EMPHASIS ADDED)

WASHINGTON POST NEWSPAPER ARTICLE CONCERNING VA HARASSMENT OF "DEEP THROAT", WRITTEN BY STAFF WRITER BILL McALLISTER, DATED APRIL 24, 1990

"Harassment Claim at VA Supported

"An internal Department of Veterans Affairs investigation has supported allegations that a VA supervisor harassed a worker who had warned a federal judge that department officials were destroying records in a highly sensitive lawsuit.

The finding by one of the department's Equal Employment Opportunity investigators is of the type that VA officials have said could trigger additional sanctions, such as contempt of court proceedings, for the department from U.S. District Judge Marilyn Hall Patel of San Francisco.

Three years ago, the judge levied a $120,000 fine for the wholesale destruction of records, needed in a lawsuit over the treatment of veterans exposed to radiation during atomic bomb tests. In addition, she warned VA officials not to harass any workers who had cooperated with the investigation of the records destruction. VA officials have told supervisors that "any adverse employment action" taken against a cooperating worker could subject the supervisor to contempt proceedings.

The fine and warning from Patel followed testimony by Barry S. Boskovich, a staff consultant in the VA's central office, who said that records in the case were being destroyed and that some VA officials were not cooperating fully with lawyers' requests for documents.

Boskovich has testified that his actions made him unpopular at the VA, and last September he complained to Equal Employment Opportunity officials there that his annual evaluation had been

lowered by a supervisor in retaliation for his actions in the lawsuit.

EEO investigator Shed Robinson Jr. said in a report submitted in February to the department's compensation and pension service that Boskovich "established a prima facie case of discrimination." Robinson said it was likely that Ted Spindle, Boskovich's supervisor, had discriminated against Boskovich because of his testimony in the records case. He recommended a finding in favor of Boskovich.

Spindle denied retaliating against Boskovich, but he did tell the investigator that he kept a separate file on Boskovich's work and that he believed Boskovich "was neglecting his duties as a result of his obsession" with the San Francisco case. Spindle declined to comment.

After receiving Robinson's report, VA officials ordered a second investigation. That report was completed last month, but it was inconclusive and basically told VA officials they would have to resolve the dispute.

Veterans Affairs Secretary Edward J. Derwinski described the Boskovich allegations as "a serious matter" in a letter to Congress earlier this year and promised he would investigate. His action came after the chairmen of the House and Senate veterans affairs committees and the House panel's ranking Democrat declared they "would be dismayed" if Boskovich was being harassed. The members of Congress noted that Don L. Ivers, the VA's general counsel, had assured them there would be no retaliation against workers who testified about the destruction of records.

Don Smith, a VA spokesman, said yesterday it will be up to officials in Boskovich's section to attempt to resolve the matter. If Boskovich is

unhappy with their offers, he can appeal the matter directly to Derwinski or to the Equal Employment Opportunity Commission for a hearing by an administrative law judge, Smith said.

As far as VA officials know, the matter has not been communicated to Judge Patel, the spokesman said.

The judge has yet to rule in the long-pending lawsuit involving veterans who were exposed to radiation during the tests."

{EMPHASIS ADDED}

VETERANS ADMINISTRATION INTERNAL MEMORANDUM, WRITTEN BY RONALD B. ABRAMS, VA LEGAL CONSULTANT, CONCERNING DOCUMENTATION OF "DUE PROCESS" PROBLEMS, AND THE NARS V. WALTERS LAWSUIT (CASE # C-83-1861-MHP, PENDING, N.D. CALIFORNIA)

"VA VETERANS ADMINISTRATION

Date: 9/25/86

From: Ronald B. Abrams, Legal Consultant

Subj: Documentation of Due Process/NARS v.Walters/Analysis/Suggested Actions

To: Director, Compensation and Pension Service (21)
THRU: Assistant Director Adjudication Procedures
THRU: Chief, Project Staff

*****{NUMBERED PARAGRAPHS 1-13 OMITTED}
"14. Mr. Erspamer will try to prove that our adjudication process systematically denies procedural due process. He will argue that our system is unfair and counteractive. He will contend that our management evaluation system emphasizes productivity and timeliness to such an extent that our managers are encouraged to violate the due process rights of our claimants.

15. Mr. Erspamer can show that it is in the best interest of our managers to have their people do, as quickly as they can, as many cases as possible. He can also show that adjudication duties dealing with the

fairness of the adjudication process such as: control of claims, supervisory review of old claims, thorough development, recognition of all issues, providing adequate notice, documenting that notice was given, and careful quality review, tend to adversely affect gross productivity and timeliness statistics.

16. Because central office does not require its regional offices to validate their local quality review, Mr. Erspamer will contend that it is in the best interest of some of our managers to deny or ignore the due process rights of their claimants. He will argue that because due process procedures increase the time it takes to adjudicate a claim, thereby slowing production, it is not in the best financial interest of our managers to follow our regulations and directives dealing with due process.

17. Mr. Erspamer can show that a managers' bonus and merit pay evaluation is based in part on the adjudication division's productivity. He will state that our system encourages some adjudication managers to report incorrect quality levels because they know that their failure to do this part of their job will not be held against them. If Mr. Erspamer can show that our system pits the financial interest of adjudication officers against the fair and reasonable treatment of our claimants, he would be well on his way to proving the VA does have an unfair, adversarial claims adjudication system.

18. Mr. Erspamer has obtained reports identifying regional offices that prematurely denied claims without notice so that credit for completed work could be taken (Baltimore). He has survey trip reports and white papers documenting that certain stations: ignored claims (Phoenix), established and

cancelled controls improperly (Baltimore, Hartford, San Francisco, WRO), discouraged complete development (Baltimore), ignored or didn't emphasize documentation of due process and carelessly performed local quality review (many regional offices).

19. The way to win this case is to distance the Compensation and Pension service, The Department of Veterans Benefits and the Veterans Administration from the people who, to improve their performance evaluations, abused our claims processing system and violated the rights of our claimants. I strongly suggest you, as Director of our Service, take appropriate administrative action against supervisors who, for whatever reason, encouraged or knowingly permitted the gross violation of the constitutional rights of claimants.

*****{NUMBERED PARAGRAPHS 20 AND 21 OMITTED} 22. We cannot defend the actions taken by some regional office and central office supervisors and win this case. Mr. Erspamer will present evidence tending to show the adjudication process is unreasonable and unfair. If we down play in Court, violations of VA rules by VA supervisors regarding the fairness of adjudication claims processing, the plaintiffs will prevail.

23. The due process clause assures reasonable procedural protections, applicable to the fair determination of the particular issues presented in a given case. (See Plato v. Roudebush 397F.Supp. 1295, (1975).) If the Court finds that our claims processing system is unfair, because VA managers are knowingly permitted to violate VA regulations and

directives, I predict a majority of the Court will search for and find the "law" to overturn our statute.

24. The best approach would be to describe the improper actions as anomalies and aberrations. Explain that we in Central Office, under your direction, have been investigating these matters for a period of time. Although proving these improprieties was difficult and time consuming, we now have enough evidence to act. (See paragraph 18 supra.) Argue that our internal actions show the inherent systemic fairness of the VA adjudication process.

*****{NUMBERED PARAGRAPH 25 OMITTED} "26. This memorandum is confidential. Because of its sensitive nature, I request that you not show this to anyone. I especially request that this memorandum not be seen by anyone in Section 214."

RONALD B. ABRAMS"

{EMPHASIS ADDED}

LETTER BY GAIL A. GOMPF, DIRECTOR, VA INTERGOVERNMENTAL AFFAIRS, TO NATIONAL VETERANS ORGANIZATIONS, ETC., DATED JUNE 5, 1986. LETTER APPEARS IN SENATE COMMITTEE ON VETERANS' AFFAIRS HEARING BOOK #100-938 CONCERNING S.11: JUDICIAL REVIEW LEGISLATION, DATED APRIL 28, 1988, PAGES 477 THROUGH 487. SUBMITTED INTO SAID HEARING RECORD AS EXHIBIT "G", BY PHILIP E. CUSHMAN, NATIONAL PRESIDENT, VETERANS DUE PROCESS, INC.

"Office of Congressional and
Intergovernmental Affairs
Washington DC 20420

Veterans Administration

June 5, 1986
Mr. Jon A. Mangis
Director
Department of Veterans Affairs
General Services Building
700 Summer Street, NE
Suite 150
Salem, Oregon 97310-1270

Dear Mr. Mangis:

"In accordance with our desire to maintain close cooperation and liaison with state offices and private agencies serving our nation's veteran community, I am enclosing copies of topical discussion papers recently released by the Veterans Administration which I think will be of immediate interest to you.

"Each of these papers address important issues concerning the continued delivery of VA health care,

benefits and other services to veterans in the future. The immediate items of discussion and interest are:

***** {ITEM #1 OMITTED} "2. Judicial Review: An overview of VA's Position." ***** {remainder of text of letter omitted}

"Sincerely,

GAIL A. GOMPF
Director
Intergovernmental Affairs"

{EXCERPT FROM PAGE 5 OF:} "OVERVIEW OF VA'S POSITION ON JUDICIAL REVIEW

"Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities {pursuant to 38 U.S.C. 3402}, informal access to adjudicatory personnel, etc., could be affected by judicial oversight and increased representation by private attorneys." ***** {BALANCE OF "OVERVIEW" OMITTED}

{EMPHASIS ADDED}

LETTER DATED MAY 10, 1988, FROM JAMES N. MAGILL, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES, TO SENATOR ALAN CRANSTON, CHAIRMAN, COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, WHEREIN MR. MAGILL RESPONDED TO WRITTEN COMMITTEE QUESTIONS. LETTER APPEARS ON PAGE 682-683, OF SENATE HEARING BOOK 100-938, DATED APRIL 28, 1988, CONCERNING S.11: JUDICIAL REVIEW LEGISLATION {VA}

"VETERANS OF FOREIGN WARS
OF THE UNITED STATES
OFFICE OF THE DIRECTOR
MAY 10, 1988

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed the Veterans of Foreign Wars response to questions submitted by you with respect to testimony given during the recent Senate Veterans' Affairs Committee hearing on April 28, 1988.

With best wishes and kind regards, I am
Sincerely yours,

JAMES N. MAGILL, Director
National Legislative Service

"QUESTION 1. A. **Do you have any concern that if judicial review legislation is enacted, your organization will lose the office space and telephones now provided to you free of charge by the V.A.?**

"RESPONSE 1. A. Yes. As you know, Title 38 of the United States Code provides that the Administrator of the Veterans Administration may, at his descretion {sic} and, should space be available, provide office and telephone services to the major veteran organizations in conjuction {sic} with the adjudication of VA claims. We, of course, would prefer Congress to mandate this space because of the invaluable service rendered by the major veterans service organizations.*****

{***** REMAINDER OF QUESTIONS AND ANSWERS OMITTED}

TESTIMONY OF DR. ALCIDE D. PELLERIN, SALEM, VA., BEFORE THE U.S. SENATE, COMMITTEE ON VETERANS' AFFAIRS, 95TH CONGRESS, CONCERNING SENATE BILL 364: VA ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW ACT, ON SEPTEMBER 21, 1977, PAGE 454. ALSO APPEARING IN SAID HEARING BOOK AT PAGE 468, IS DR. PELLERIN'S "OUTSTANDING {VA} PERFORMANCE RATING AND SUSTAINED SUPERIOR PERFORMANCE AWARD" {OMITTED}

"Dr. Pellerin. Mr. Chairman, honorable members of the committee. Thank you for giving me the opportunity to testify in this worthy cause. Please bear with me if I appear stage frightened, because I am. This is understandable in view of the fact that I have been waiting 31 year for this moment.

I am Alcide D. Pellerin, doctor of medicine, Boston University of Medicine, class of 1939. The pertinent aspect of my curriculum vitae consists in VA employ as a disability evaluation specialist for 4 years at the regional office level, and for approximately 4 years as associate member of the Board of Veterans' Appeals here in Washington.

In cases where veterans have succeeded in breaking the VA legal barrier, the illegal barrier would be more appropriate, and had their cases docketed in Federal court, the BVA decisions were reversed in every instance. There must be more to it than mere coincidence.

Since time does not permit presenting an expose of all that is wrong with the VA, which would require several hours if not several days, I shall limit myself to presenting one outstanding case of injustice and abuse of power on the part of the BVA.

The case is that of Frank X, who in 1948 sustained a crushing injury to his lower extremities

necessitating amputation. The surgical intern reported that the amputation was at the junction of the middle and upper third of the femur.

The VA promptly rated the disability 30 percent, some 20-odd years later an X-ray of the hip showed the amputation to have been 3 inches below the hip, which rated a 60-percent disability.

The VA gave him his due 60-percent disability from the date of the X-ray. Frank appealed, claiming 60 percent from the date of discharge. The Board of Veterans' Appeals upheld the denial. He asked for reconsideration, and a panel of two sections again denied.

Frank again was able to get a second reconsideration, this time by a panel of three sections of which one was my section.

During deliberations the BVA contended that it was not guilty of an error in the assignment of 30 percent after discharge, and therefore the veteran was not entitled to a retroactive 60 percent. I argued that Frank was not guilty either, and that he should not be penalized for an error by the VA physician.

I further argued that the issue was not one of guilt and that guilt should not be a basis for adjudication. I pointed out that the statutes do not say that only when the BVA is guilty of making an erroneous decision, are the benefits to be made retroactive, but they state that any time a decision is clearly and unmistakably erroneous, retroactive benefits are in order.

I dissented, but eventually gave in under duress as in many other cases. Frank, wherever you are, please forgive me for having taken part in robbing you of $40,000 of $50,000 in due benefits.

Two wrong things stand out like sore thumbs in this case. One, the arbitrary and capricious interpretation of the law; two the abuse of power by

the chairman of the BVA in dictating and imposing his will on the board members.

Since the BVA is the last word, the veteran has to grin and bear, and regret that he hadn't defected or deserted.

During the next few minutes I would like to give you examples of some of the dirty tricks used by some VA personnel to achieve the VA objective of denying claims. One is a case, a diagnosis of "athlete's foot" was made during an official exam. That was not to the liking of the reviewing chief who, I assume, wanted to serve his master well and at the same time feather his bed.

So he eradicated the diagnosis and created his very own diagnosis, "athlete's foot not found." The denial of the claim was sustained by the BVA. This, I can assure you, would never be allowed to happen in a court of law.

Two, in getting an independent medical expert opinion, the BVA typically utilizes a medical school staff member who is also on the staff of the VA hospital associated with the medical school, who is on some sort of a salary by the VA, and who according to my research had been a regular VA employee for several years at some time or other in the past.

This "setup" inevitably constitutes conflict of interest, yet the medical expert's word is on "a par" with the divine word of God. In contrast, should the veteran submit an opinion from a board certified specialist, say from some institution like the Mayo or Lahey Clinic, the Arthritis Foundation or the Georgetown Medical Center, that opinion only serves to reopen his case, and is considered trash by the VA.

Not only does a court of law ban conflict of interest, it encourages the challenging and

questioning of the expertise of an expert, which is the lifeblood of the legal system. One last case: When the so-called VA independent medical expert was confronted with a finding, in the service medical record, that was favorable to the veteran, he defied the rule of evidence and ruled that the military doctors had made an erroneous finding.

Based on that medical expert's opinion, the BVA issued a denial; again in a court of law the BVA decision would surely be reversed.

In summary, the basic problem is one of uncontrolled, unchecked, incorrectable injustice to the veteran because of the dictatorial power of the BVA. This runs counter to our great American ideal of democracy, which abhors and denounces dictatorship, and to the Constitution, which guarantees justice in a court of law for every citizen.

Please, gentlemen, I beg you, make it possible for the veteran to get justice, and the only possible way to accomplish this is not in the VA kangaroo courts but in the Federal courts, which should be open to the veteran, as to the nonveteran.

It is my understanding that even aliens now have access to the courts, If the veteran is not more deserving then he is at least as deserving as the nonveteran citizen or the noncitizen.

Senate bill 364 would take the VA out of its lofty ivory tower and bring it down into the realm of justice and fair play for the veteran.

I wish to thank you gentlemen for your patience and attention and hopefully for your understanding of the plight of the veteran.

Chairman Cranston. Thank you very much, Doctor."

{EMPHASIS ADDED}

EXCERPT FROM CONGRESSIONAL BUDGET OFFICE (CBO) "COST ESTIMATES", PROJECTING THE COSTS FROM ENACTMENT OF SENATE BILL 349: "VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT". SAID ESTIMATES APPROVED BY JAMES L. BLUM, ASSISTANT DIRECTOR FOR CBO BUDGET ANALYSIS DIVISION, APPEAR IN SENATE REPORT NO. 97-467, DATED JUNE 8, 1982, AT PAGES 56 THROUGH 61.

*****{PAGE 60} "It was assumed, based on a BVA estimate, that the rate at which cases are denied by BVA will drop from its present level of 70 percent to about 60 percent with the use of independent medical opinions (as authorized by section 108) and precedent decisions."

*****{PAGE 61 OF REPORT} "The VA estimate of the increase in the workload of the General Counsel's office assumes a denial rate in BVA decisions of 72 percent. BVA asserts, however, that the current denial rate is 70 percent and would decrease to 60 percent under the provisions of S.349. The lower denial rate will result in a lower number of appeals and, therefore, a smaller increase in the workload of the General Counsel's staff."

{EMPHASIS ADDED}

HANDWRITTEN LETTER BY T.A. VERRILL, ADJUDICATION OFFICER, SAN FRANCISCO VA REGIONAL OFFICE.

"Section Chiefs

"Although VAR 1103 permits a hearing anytime on any issue, we do not have the resources to operate in this way. Hearings should follow the statement of the case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. We can always explain why a hearing is not appropriate at a particular stage in processing. In cases previously disallowed, the hearing process must be discouraged as a means of presenting new and material evidence. Personal history can be presented on VAF 21-4138 or affidavits. Recitation of facts already of record or new facts not tying the issue to service, e.g. a description of present symptoms, will not help the case. I know you are aware of these points, but the appellant isn't.

To effect this change in policy, employees will obtain the initial of a Section Chief on all requests to 21 to schedule a hearing.

T.A. Verrill
ADJ. OFF."

{Emphasis added}

PORTION OF "REPORT" NO. 100-418 OF THE COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, DATED JULY 7, 1988, CONCERNING S.11: VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT. PORTION QUOTED APPEARS AT PAGE 45 OF REPORT.

"5. HEARINGS BEFORE TRAVEL BOARD SECTIONS"

"As discussed earlier under the heading "Shady Methods to Speed Claims Resolution," one of the drawbacks to the BVA being situated in one location -- in Washington, D.C.--is the lack of ability on the part of many veterans to attend personal hearings before the Board. This is particularly the case because of the BVA statistics showing that allowances are statistically far more frequent after personal appearances before the Board in Washington (19.5% in FY 87) and after appearances before a traveling section (30.6% in FY 87). In a general effort to permit an opportunity for more personalized appearances to those who are unable to travel to Washington, D.C., the BVA utilizes two alternative methods. Under the first, the BVA authorizes VA Regional Office adjudication personnel to act as agents for the BVA and, in that capacity, to conduct appellate hearings at Regional offices. The transcripts of these hearings are then sent to the BVA for a decision by a Board panel. Although this does not provide an opportunity for a hearing, the Committee is concerned that it is clearly an inadequate substitute for having the decisionmakers see and hear the claimant and other witnesses. In response to questions from the Chairman, the BVA Chairman testified at the June 16 hearing that there is no method for transmitting to

the BVA any information about the hearing personnel's assessments of the credibility of the claimant or other witnesses.

The second alternative involves a BVA Section traveling to various Regional Offices and holding personal hearings for a certain number of days. Due to the limitation on resources, there are a limited number of travel Board hearings available. In FY 1987, 739 such hearings were held. At the Committee's hearing, the BVA Chairman testified that because of the limited number of such traveling Section hearings, the BVA did not routinely tell claimants about this option. Specifically, Mr. Eaton noted, "If you advertise that too much, you are going to get more than you can handle". In this regard, the Committee notes that the form filled out by claimants to request an appeal to the BVA (Form 1-9) presents only two options to the claimant: One for a field hearing before Regional office personnel, as discussed above, and one for a hearing in Washington, D.C. There is no option presented for selecting a hearing before a traveling Board Section. According to Mr. Eaton, the traveling Board hearings are scheduled by giving veterans' service organizations a certain number of hearings, and allowing the service officers to designate who receives a hearing. When asked at the Committee's hearing why the veterans service organizations find it desirable to have hearings before the traveling Board Sections, Mr. Eaton replied:

> "It is always better in any case to have a personal hearing before the people who are deciding. There are exceptions to that; but generally, if you have a good case and you have a witness who is at all

credible, you are better off facing those Board members and telling them all about it. Those are the facts of life.

Not only are travel board allowances higher, but personal hearings in Washington are higher -- not as high as travel board -- but there is not as much selection in the Washington office as in the travel boards. But they do pick and choose.

They are only allowed a few cases on the travel board for each service organization. They can only have so many because there is only so much time available for the travel board to hear those cases. So, they pick the best cases."

"When asked if there is a quota, Mr. Eaton replied, "In effect. It has to be that way."

The Committee believes strongly that this method of allocating hearings before traveling Board sections is contrary to the accepted notions of evenhandness, fairness, and justice in that every individual should have an equal opportunity to obtain the most beneficial process. Accordingly, the Committee bill contains a number of changes to the current scheme regarding notice about allocation of traveling Board hearings.***** {LAST PARAGRAPH OMITTED}

{EMPHASIS ADDED}

"LETTER TO THE EDITOR" OF THE WASHINGTON POST, DATED JULY 1, 1986, WRITTEN BY 4 MEMBERS OF CONGRESS, REVEALING THAT VETERANS ARE DENIED EQUAL PROTECTION OF THE LAW, BY NOT BEING ALLOWED TO SUE THE VA, BUT THE VA IS SUING LARGE NUMBERS OF VETERANS. LETTER ALSO REVEALED THE VA BLACKMAIL OF THE VETERANS ORGANIZATIONS WHICH PROVIDE FREE REPRESENTATION TO VETERANS CONCERNING THEIR CLAIMS AGAINST THE VA, BY THREATENED SAID ORGANIZATIONS THAT THEIR "FREE OFFICE SPACE . . . TELEPHONE SERVICE . . . " ETC., BENEFITS, PROVIDED TO THEM NATIONALLY BY THE VA, "MAY HAVE TO BE CURTAILED/COULD BE AFFECTED" BY PASSAGE OF JUDICIAL REVIEW LEGISLATION.

"CONGRESS OF THE UNITED STATES
House of Representatives
Washington, DC 20515
July 1, 1986

Letter to the Editor
The Washington Post
1150 15th Street, N W
Washington, DC 20071

Dear Editor:

"Some opponents have taken issue with your support of H.R. 585, a bill to authorize court review of VA decisions and to allow veterans the right to counsel of their choice. As sponsors of the bill, permit us to address just a couple of points.

It is laudable that "as a matter of principle, the VA doesn't view itself as a prospective litigant with

the veteran." Unfortunately, that statement doesn't square with reality. In the past four years alone, the VA has filed suit against more than 140,000 veterans, for alleged benefit overpayments that average $570.

While litigating against these veterans, the VA says that the court can't even listen to the veteran's defense, arguing that current law precludes judicial review of any decision of law, regulation, or fact made by the VA.

Further, the VA's commitment to an "informal and cooperative system" must be called into question when the VA tells veterans' organizations that passage of judicial review legislation will result in the loss of the free office space, furniture, and telephone service {pursuant to 38 U.S.C. §3402 (a)(2)} presently provided to these groups in VA regional offices." {*****Balance of letter omitted}

Sincerely,

DON EDWARDS
Ranking Majority Member
Veterans Affairs Committee

LANE EVANS
Chair, Vietnam-Era Veterans in Congress

THOMAS A. DASCHLE, Chairman
Subcommittee on Education, Training,
and Employment, Veterans Affairs
Committee

BOB EDGAR, Chairman
Subcommittee on Hospitals and Health
Care, Veterans Affairs Committee"

{EMPHASIS ADDED}

STATEMENT OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AT A HEARING BEFORE THE SUBCOMMITTEE ON SPECIAL INVESTIGATIONS OF THE COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES HOUSE OF REPRESENTATIVES, NINETY-SIXTH CONGRESS, SECOND SESSION, CONCERNING JUDICIAL REVIEW OF VETERANS CLAIMS, NOVEMBER 19, 1979. PAGE 330 OF HEARING BOOK.

"The American Federation of Government Employees, AFL-CIO, is pleased to have the opportunity to submit its views concerning legislation (H.R. 6181) providing, among other things, judicial review of certain final decisions of the Administrator of Veterans Affairs. AFGE represents over 700,000 personnel throughout the federal government. **Within the Veterans Administration itself, AFGE holds some 248 exclusive units of recognition representing nearly 116,000 personnel,** including personnel in the Board of Veterans Appeals in the VA central office in Washington, D.C.

Yet we must also observe that **among our membership considerable dissatisfaction exists** concerning the lack of access to the courts on the part of veterans who wish to appeal final determinations concerning benefit and disability decisions made by the Veterans Administration. In effect, under current law, **veterans have been relegated to the status of second-class citizens** who are denied the same rights of judicial review available to most other beneficiaries of federal entitlement programs.

In this regard, we note that **a demonstrated need exists for the Veterans Administration to be subject**

to judicial accountability. We have seen figures which clearly indicate that the veteran making an appeal to the Bureau of Veterans Affairs (BVA) is under a serious disadvantage. Whereas appeals to the Social Security Administration are decided in favor of the claimant in two out of three cases, actual results support or favor the veterans claim in the BVA in only one out of ten cases.

AFGE recognizes that exact comparisons between these very different programs are difficult to make, but it appears to us as though large numbers of veterans have not received the benefit of reasonable doubt on any consistent basis. The informality of the Veterans Administrations appeals procedure, combined with the absence of precedence in the disposition of cases, leaves wide discretion for inconsistent and uncontrolled decision making by the regional offices. In the absence of court review, there is no effective institutional check on arbitrary or impermissible action.

We do not mean to imply, however, that the dedicated career personnel in the Veterans Administration who are involved in the review process are not faithfully executing their duty to veterans and to the public. In fact, considering the budget squeeze on the agency over the past few years such personnel have done much to uphold the integrity of the review process. The Office of Management and Budget has brought substantial pressure against government agencies to control outlays, and such pressure can easily translate into tougher guidelines and policies concerning various entitlement and spending programs, particularly when such policies are not subject to any outside review. The Veterans Administration, for example, has made several contracting-out decisions in recent years which we believe cannot be justified on

grounds of cost-effectiveness or government efficiency and which have harmed the delivery of services to patients in the hospital system. In such instances, considerations of false economy have been placed above the needs of federal workers, taxpayers and the public.

Finally, we would also like to point out that in view of the numerous outstanding problems faced by today's veterans, particularly by those who fought in Southeast Asia, it is imperative they feel they have received the benefit of full due process from the federal government. There has been much recent public concern about the plight of the "forgotten veterans." We believe that passage of legislation providing judicial review in the claims process will show Congress still cares."

{Emphasis added}

LETTER FROM NORMAN J. JOHNSON TO HON. ALAN CRANSTON, CHAIRMAN, COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, DATED OCTOBER 11, 1977, AS SAID LETTER APPEARS ON PAGE 786 IN SENATE HEARING BOOK CONCERNING SENATE BILL 364: "VA ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW ACT", NINETY-FIFTH CONGRESS, FIRST SESSION.

"STATE OF CONNECTICUT
DEPARTMENT ON AGING
90 WASHINGTON ST.
HARTFORD, CONNECTICUT 06115
Tel. 566-7725
WILLIAM R. RATCHFORD
Commissioner

October 11, 1977

"Honorable Alan Cranston, Chairman
United States Senate
Committee on Veterans' Affairs
Washington, D.C. 20510

Dear Senator Cranston:

"I was scheduled to testify on S. 364 last month but I could not make the personal arrangements necessary to do so. Similarly, I have not found the time to prepare elaborate written testimony. I do, however, have insights into the workings of the Board of Veterans' Appeals which I want to share with you and the members of the Committee.

I was a "staff legal advisor" to the Board of Veterans' Appeals for nine months in 1971-72. The "staff legal advisors" are the attorneys who actually write the Board's decisions, subject to review and ultimate approval of an appellate panel of two lawyers and one physician. I had previously

practiced law for two years and the first thing I had to learn at the B.V.A. was to shelve my notions of professional objectivity and procedural due process.

Early on, I learned that there was a covert quota system in effect. Job performances of staff attorneys were rated by the number of decisions written in a given week. The fact of this quota system was always denied by the panel members and the front office; it was a well known fact to the staff attorneys. Each week a tally was circulated to all personnel showing the number of decisions produced by each attorney and the total for each of the dozen or more sections of the Board. There was clearly a competitiveness between sections and among the attorneys in any given section. One was expected to produce a minimum of six decisions a week and I was once cautioned by a panel member not to exceed one dozen per week so as not to drive up management expectations. I cannot believe that justice is accorded its due when the decision process is managed in such a way.

Inconsistency of decisions is a major shortcoming of the Board and its processes. A case might well be decided on unwritten principles peculiar to one section and originating in the isolated perspective of the panel chairman. (For example, my section would allow service connected status for the ear condition of tinnitus if it accompanied another ear disorder for which service connection was or could be established. Another appellate panel usually denied tinnitus claims when a veteran already had service connected status for an ear disorder. My panel's reasoning was that since tinnitus is a subjective condition, the existence of other ear disorders was the best evidence of it; otherwise tinnitus could not be established to exist. The other panel's reasoning, as explained to me, was

that if a veteran was "service connected" for one ear condition he was already getting his due.)

Discussions with other staff attorneys indicated that our respective panels interpreted statutes, regulations and precedent in haphazard patterns and dogmatically applied their peculiar unwritten formulas to the cases at hand. The fact that decisions were written by lawyers seemed more a function of bolstering the legitimacy of the process rather than one of actually conducting professional inquiries into the facts and applicable law of the cases.

Because cases were decided on differing grounds, and for reasons not contemplated by the laws and regulations, case decisions were haphazard, unfair and probably illegal. To be specific, in my section there was a practice of absolutely denying claims for service connections where the service departments could not produce any medical records. This was not an infrequent problem, and surely many valid claims were refused on these grounds. To cover the situation and the embarrassment of the loss of the records, the opinion would recite something to the effect: "Service medical records do not indicate treatment for the claimed injury." Such evasion was common in cases where there were no records.

Another disturbing aspect of the appeals process and its freedom from outside review was the tendency to review a veteran's service records for indications of worthiness. A number of proffered decisions were reversed by the section because the facts were not overwhelming and the veterans' records showed infractions of military discipline, even minor ones. Again, the biases and individual standards of panel members affected the decision - and they would differ from one section to the next.

On questions of permanent and total disability claims, my section was very tight. Where the facts

were close, the decision always went against the veteran, although the statutes mandate a liberal interpretation. In one particular case I took an advocate's position because I was convinced of the merits of the veteran's disability claim. I urged consideration of the fact that the Social Security Administration had made a determination of disability. One of the section members dismissed that argument with the comment, "Those liberal b-----ds would give away the treasury." (My own previous experiences with Social Security disability claims had led me to the opposite conclusion.)

These experiences and criticisms may seem minor but I believe they illustrate the dangers of the present closed review scheme of veterans' claims. Veterans deserve equal and fair treatment and they will not get it until the current scheme is opened to the review of an independent judicial process.

I want to leave you with one final example of B.V.A. attitudes: I once drafted and dictated an appeals decision granting service connection status for a black, Korean action veteran. The elements of the case were clear - His induction physical examination report indicated normal feet. The separation physical indicated "pes planus" or flat feet, not an unusual development over the course of Army service and one that can be painful and limiting for all of the jokes that are made of it. The facts and the law were clear, but the decision was returned to me with instructions to deny the claim.

I found it difficult to evade the letter of the law and I considered it dishonest to arbitrarily deny the facts in order to reach the decision my supervisor desired. I asked the section chairman why the decision was to be a denial. He explained that it was because the veteran was black and all black people eventually get flat feet. It was a "racial

characteristic!" I now wonder how many decisions were written or decided by that man in his thirty-odd years with the Board of Veterans' Appeals?"

Sincerely yours,

Norman J. Johnson"

(Emphasis added)

STATEMENT OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS, AS A WITNESS AT A HEARING ON NOVEMBER 19, 1980, BEFORE THE SUBCOMMITTEE ON SPECIAL INVESTIGATIONS, OF THE COMMITTEE ON VETERANS' AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, NINETY-SIXTH CONGRESS, SECOND SESSION, CONCERNING JUDICIAL REVIEW OF VETERANS' CLAIMS

"I will summarize a portion of my statement with the understanding it will be published in the record in full.

As this committee is aware, for more than 30 years the VFW has agonized with the judicial review problem. For a number of years we opposed judicial review by resolution, not always with unanimity but always by majority vote.

At our 80th national convention held in Dallas, Tex., in August 1979, our position changed in that the voting delegates rejected a resolution opposing judicial review and accepted a resolution after much debate and rewrite of the resolution to support judicial review.

In the legislation to provide judicial review of veterans' administrative claims decisions pertaining to matters of law and regulation, insofar as the merits of the claim are concerned, and review of the facts that are alleged to be arbitrary and/or capricious. Identical language is contained in our now current Resolution 680 passed by the voting delegates to our 81st national convention held in Chicago this past August.

You may wonder, Mr. Chairman, and rightly so after so many years, the Veterans of Foreign Wars

changed its position with respect to judicial review, and the following reasons are offered:

1. There are those who believe a system which permits welfare or supplemental security income recipients to seek court relief but denies the same forum to veterans is flawed.

2. Many Vietnam veterans are aware that the Veterans' Administration, in concert with the President's Office of Management and Budget, attempted in 1973 to rewrite the rating schedule to their advantage, believe the VA has been insensitive to their needs and are disenchanted believing that they have not received timely, full, fair, and impartial consideration of their appeals.

Claims of older veterans are often viewed with a jaundiced eye simply because they deferred filing. In the absence of substantiating service medical records "buddy statements" by former prisoners of war and other knowledgeable witnesses are nearly always discounted as having been made from remote memory.

3. One of the most frequently heard complaints by our national officers in their travels is the complete frustration of those whose claims have been denied and due to the finality statute of 38 U.S.C. 211(a) are foreclosed from redress through court action.

4. Many service officers are increasingly disappointed in the denial of cases which they believe have considerable merit. Also, they wonder why, over the past 8 years, the percentage of cases allowed by the Board of Veterans' Appeals has fluctuated only a little over 2 percent whether that body considered 25,000 cases in the year or more than 35,000 cases. The average allowances have been 12.8 percent of cases considered. In the last 4 fiscal years, the variance has been only two-tenths of 1 percent in

that allowances in 1976, 1977, and 1979 were 12.7 percent and in 1978, 12.5 percent, in 1980, 12.4 percent.

Restrictive language first surfaced some 93 years ago with passage of the Tucker Act in 1887 now encoded as 28 U.S.C. 1346(d). Note 536 of the annotation to this citation clearly reflects Congress' intention to prevent court review of pension claims.

Coupled with the foregoing and lending credence to administrative finality has been the historically held position of Congress and the courts that veterans' benefits are gratuities and not a right. President Eisenhower appointed the Bradley Commission under Executive Order 10588.

You will recall that the Bradley Commission declared that military services is an obligation of citizenship and that veterans are not entitled to any more consideration than nonveterans. Thus the Commission joined the vociferous minority opposed to special consideration for veterans and provided a Roman holiday for an unfriendly press which applauded the courage of General Bradley and the Commission and proclaimed that at long last special consideration for veterans would be tossed out the window.

Thanks to the wisdom of Congress, this did not happen. In the Commission's report, the following language is set forth:

The gratitude of the Nation to those who have served it in time of war is fundamental in the whole concept of American veterans' benefits.This tends to place benefits in the category of a gratuity to which the recipient (the veteran) has no legal 'right', and which the giver (the government) has a legal right to withhold.

Mr. Chairman, while Veterans' Administration claimants' access to the Federal courts has been

foreclosed, potential recipients of other Federal benefit programs took advantage of court decisions to elevate the status of their benefits from mere gratuities to the level of statutory entitlements with vested property interest.

This trend, which commenced in the 1960's. culminated in the landmark case of Goldberg v. Kelly, 397 U.S. 254 (1970), wherein the Supreme Court concluded that welfare benefits are matters of statutory entitlements, more likely property interests than gratuities.

Mr. Chairman, it is a strange lesson in logic, indeed, that welfare recipients and those in the supplemental security income program enjoy the right to judicial review while our veterans, their dependents, and survivors are foreclosed from this same avenue.

If welfare benefits are not gratuities, the word has lost its meaning. Surely veterans' benefits are not gratuities notwithstanding repeated rhetoric to the contrary. No veteran has ever received anything for nothing. At the very least, those who have served honorably in uniform during periods of war and hostility have given years from their lives, their families, and their personal endeavors, if not their mental or physical health or their very lives.

This concludes my summary, and I will be happy to answer any questions you may have.

Mr. Leach. Thank you, Mr. Schwab. That was a very stimulating presentation."

{Emphasis added}

EXCERPT CONCERNING "EQUAL PROTECTION" FROM PREPARED STATEMENT OF SIDNEY COOPER, NATIONAL LEGISLATIVE DIRECTOR, VETERANS DUE PROCESS, INC., BEFORE THE COMMITTEE ON VETERANS' AFFAIRS, HOUSE OF REPRESENTATIVES, ONE-HUNDREDTH CONGRESS, SECOND SESSION, ON SEPTEMBER 8, 1988, CONCERNING "JUDICIAL REVIEW OF VETERANS' AFFAIRS", HEARING BOOK SERIAL NO. 100-60, PAGE 412-445, FOLLOWING EXCERPT AT PAGE 439.

"Is Mississippi, the Promised Land of Veterans Benefits?

Inexplicably, the chance of obtaining service connected V.A. pensions in Mississippi and Arkansas appears to be twice as great as anywhere else in the U.S. Further, the average pensions granted there are considerably higher too - 30% greater in Mississippi; 43% greater in Arkansas.

Non-service connected disabilities likewise fare extremely well; 2.3 X the national average in Mississippi; 1.9 X in Arkansas. Incredibly, there are 72% as many Non-Service connected claims in Mississippi as there are Service connected claims; in Arkansas, 60%. The national average is only 31% which means that Mississippians are either sicker or smarter than everyone else.

What explanation can there be for this blatant favoritism? Deference paid to veterans residing in Mississippi and Arkansas should come as no surprise to students of the V.A. and the House Veterans Affairs Committee (HVAC). Cong. G.V. Montgomery (D.Miss.) is the chairman of the HVAC while John Hammerschmidt (R. Ark) was its ranking Republican member. Seniority and power obviously

have an impact on what veterans receive and from which state.

How could such blatant favoritism take place without arousing the ire of the country? The awful truth is, that no one is watching the V.A. or analyzing its operations. Not the Congress; not the Press; not the Courts - not the States - not the NVSO's - not anyone!

Apparently, based upon the benefits dispensed in 1985, States such as California are being short changed $310 million, per year; Illinois, $204 million; Indiana, $70 million, whereas Mississippi and Arkansas are riding the "gravy train". No satisfactory explanation has been offered to explain such large pension descrepancies.

Mississippi has provided the armed forces with the lowest number of service men (92.1 per thousand) whereas the national average is 118.2 per thousand of population. Yet they receive more claims and higher per capita benefits. No wonder Cong. G.V. Montgomery says the system ain't broke! It does all right for Mississippi and Arkansas.

Accordingly, based upon the 1985 VA numbers, Mississippi is last in war but first in the hearts of the VA.

> (Note: All numbers and relationships developed therefrom were extrapolations derived from the V.A. Fiscal Year, 1985 reports furnished the Congress)."

{EMPHASIS ADDED}

LETTER FROM KENNETH E. EATON, CHAIRMAN, BOARD OF VETERANS APPEALS (BVA), TO UNITED STATES SENATOR GARY HART, DATED JUNE 30, 1982, INDICATING AN 11.3% ALLOWANCE RATE IN APPEALS THAT REACHED THE BVA DURING THE 30 YEAR PERIOD 1952 THROUGH 1981, AND A 12.9% BVA ALLOWANCE RATE DURING THE 12 YEAR PERIOD, 1970 THROUGH 1981.

"Board of Veterans Appeals
Washington, D.C. 20420
"Veterans Administration

June 30 1982

Honorable Gary Hart
United States Senate
Washington, DC

Dear Senator Hart:

"Your letter of June 11, 1982, was referred to the Board of Veterans Appeals (BVA) for an answer to the second question regarding cases appealed to the Veterans Administration.

We do not have complete statistics for 30 years. The best information we have:

- Appeals that reached the Board of Veterans Appeals - FY 1952-1981 (30 years):

  BVA decisions 989,303

  Allowed by BVA 111,338

- Appellate actions - FY 1970-1981 (12 years):

  Appeals initiated (Notices of

Disagreement filed) 670,977
Allowed in field offices 111,401

BVA decisions 363,746

Allowed by BVA 47,044

Allowed in field offices following

Remand by BVA 11,736
Combined allowances. 170,181

I hope this information will be helpful.

Sincerely yours,

KENNETH E. EATON
Chairman"

{ON THIS PAGE, WOULD HAVE APPEARED A SINGLE PAGE OF VITAL BOARD OF VETERANS APPEALS STATISTICS (I.E. ALLOWANCE RATES, ETC.), SUMMARIZING A 10 (TEN) YEAR PERIOD. UNFORTUNATELY, SUPREME COURT FORMATTING RULES NECESSITATED 10 (TEN) PAGES TO SET FORTH THE IDENTICAL INFORMATION. CONSEQUENTLY, THE RESULTING PRESENTATION DEPARTED FROM THE BREVITY AND CLEARNESS CONTEMPLATED BY SUPREME COURT RULES, AND, ACCORDINGLY, IS OMITTED. SAID STATISTICS AVAILABLE UPON REQUEST}

EXCERPTS FROM WASHINGTON POST NEWSPAPER ARTICLE, BY STAFF WRITER BILL McALLISTER, DATED FEBRUARY 8, 1990, ENTITLED "THE FIRST FOOTPRINTS IN THE SAND --- NEW VETERANS' CLAIMS APPEAL COURT HOLDS INITIAL SESSION"

*****{PARAGRAPH 2} "It took years of debate and an act of Congress, but a new federal court-the first federal judiciary body to be created in 30 years-held its initial meeting yesterday to hear the claims of the nation's aggrieved veterans."

*****{PARAGRAPH 15} "The court located its offices at 1625 K Street NW, two blocks from the VA's central office and Nebeker {Chief Judge} has made clear that he wants a sharp line drawn between his court and the VA. When veterans ask about the relationship, the judge said he responds, "**We do give them [the VA] preference, but we do correct their papers.**"

{Emphasis added}

"INFORMAL GRIEVANCE", DATED MAY 11, 1987, FILED WITH THE CHAIRMAN OF THE BOARD OF VETERANS APPEALS (BVA), AND SIGNED BY SEVERAL INDIVIDUALS AT THE BVA. SAID GRIEVANCE WAS SUBMITTED AS AS A PART OF EXHIBIT "J" TO THE PREPARED STATEMENT OF RICHARD E. O'DELL, VICE PRESIDENT, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, AT A HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, ONE HUNDREDTH CONGRESS, SECOND SESSION. SAID VVA TESTIMONY APPEARS BETWEEN PAGES 95 AND 195 OF THE CONGRESSIONAL HEARING BOOK. EXHIBIT "J" WHICH, IN PART, APPEARS BELOW, IS ON PAGES 141 THROUGH 144.

"MAY 11, 1987

INFORMAL GRIEVANCE

"The undersigned, Members of the Board of Veterans Appeals, both individually and jointly, hereby present an informal Grievance against the Chairman of the Board of Veterans Appeals based upon a policy of awarding bonuses to various Board Members depending on the number of decisions produced in their individual sections.

Instead of providing a fair and impartial system of handling the number of appeals, the Chairman is engaging in acts, practices, policies and courses of conduct to pressure Board Members and Sections into increasing the number of cases being processed each year without regard to the amount of time that

must be devoted to each individual case in order to give it adequate legal and evidentiary consideration and in order to render a careful, correct, fair and impartial written decision consistent with the Members' obligation to treat each claimant in accordance with the requirements of due process.

*****{PARAGRAPH #5} "The current system rewards carelessness but penalizes diligence. Obviously, a section that produces the quota of 40 decisions per week spends at least one hour of time for each case. A number of sections have found that proper processing of this amount cannot be done and have fallen behind the weekly quota. On the other hand, for example, a section that produces 80 cases per week spends on the average only one half an hour on each case. It is obvious that a one half hour review cannot be as complete as a one hour review. It is also apparent that the high producing section is rewarded for doing less work on each case. The record will show that on a number of occasions in the past, certain sections have processed more than 80 cases in a single week. We dispute any contention that under these circumstances, each case was given a thoughtful and thorough review by each Board Member.

*****{PARAGRAPH #7} "Another, and perhaps the most serious manipulative method of exploiting the current system is by obtaining signatures on decisions by Board Members (or Acting Board Members) who sign the decisions despite not having reviewed the case. This so-called "courtesy" system not only deprives our claimants from a review to which they would otherwise be entitled, but is also used to artificially increase the production of decisions. We need not identify those sections that regularly engage

in this practice because their identity is well known to the Deputy Vice Chairmen who review their decisions.

*****{PARAGRAPH #9} "With regard to the same system of "courtesies", any section member can give an "in house courtesy" signature, thereby accomplishing the same result as obtaining a "courtesy" signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for proper adjudication of claims."

The undersigned are of the opinion that the pressures to meet goals or quotas (or even to increase allowance rates) are illegal. In the case of Association of Administrative Law Judges, Inc., v. Heckler, 594 Fed Supp 1132, decided September 10, 1984, the Court observed that the Administrative Procedures Act contained a number of provisions to safeguard the decisional independence of ALJ's. They are exempted from performance appraisals to which other Civil Service employees are subject. ALJ's do not receive monetary awards or periodic step increases based on performance. (Emphasis supplied). Cases must be assigned, whenever possible, in rotation. (In that case, the Social Security Administration was pressuring the ALJ's because of excessive allowances.

*****{PARAGRAPH 16} "In summary, the undersigned, both individually and jointly, are aggrieved by the system used by the Chairman to either grant or withhold monetary awards based on the number of decisions produced during the counting period. The grievance is based on the fact that the award system cannot be administered in a

fair and impartial manner and the fact that the system is subject to abuse and manipulation of certain sections. The system penalizes those individuals who do more work, i.e., spend more time reviewing each case and rewards those who do less work on each case and who subvert the established review process by eliminating at least one review. With regard to the entire grievance procedure, the undersigned will exhaust all of its administrative remedies prior to taking any other action."

{EMPHASIS ADDED}

EXCERPT {PAGES 238 AND 239 OF HEARING BOOK} FROM THE STATEMENT OF ROBERT O. MULLER, PRESIDENT, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED JUNE 4, 1986, BEFORE THE HOUSE OF REPRESENTATIVES, COMMITTEE ON VETERANS AFFAIRS, CONCERNING H.R. 585: "JUDICIAL REVIEW OF VETERANS CLAIMS", NINETY-NINTH CONGRESS, SECOND SESSION. HEARING BOOK SERIAL NUMBER 99-52, VOLUME 1, PAGES 230 THROUGH 279.

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{Hearing Book page 238} 1. "VA Errors

Although the need for judicial review does not hinge on VA errors, it is beyond dispute that the VA sometimes makes erroneous decisions. Recent oversight hearings of the BVA makes this clear. For example, the following exchange took place during these hearings between Congressman Applegate and Kenneth Eaton, Chairman of the Board of Veterans Appeals:

Mr. Applegate:

> Later on we will be receiving a comment from a witness about allowance rates from the various sections of the [BVA], and that perhaps some panels have consistently lower allowance rates than others . . . . Have you observed this and, if you have, do you have any comments about it.

Mr. Eaton:

> Yes, indeed, it is quite true that there is what I might say is a significant variance between

different sections of the Board and how they see these cases

. . . There are a couple of sections, or Board members, I suppose, who are rather low in their allowances. But, you know, you can't tell them what to do. . . .

Mr. Applegate:

You can have equal cases, identical, where one will get more than the others,

Mr. Eaton:

I'm afraid so.[2]

Also at these BVA oversight hearings, the American Legion testified that:

As an important part of our involvement with the issue of veterans suffering from post-traumatic stress disorder (PTSD), we have given special attention to reviewing the decisions of the Board of Veterans Appeals involving claims for service connection or an increased rating for PTSD. There have emerged from this on-going review several problems which have been brought to the

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[2] Oversight Hearing on the Operation of the Board of Veterans Appeals: Hearing before the Subcommittee on Compensation, Pension, and Insurance of the House Committee on Veterans' Affairs, 99th Cong., 1st Sess. 10-11 (1985) (hereinafter "1985 House Hearings").

attention of the Chairman of the Board of Appeals and other VA officials without satisfactory resolution.

In our judgment too many valid claims are being denied by the regional offices, and the denials are subsequently confirmed by the Board of Veterans Appeals.[3]

VVA has observed this problem as well."

{EMPHASIS ADDED}

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[3] Id. at 40 (Statement of Philip R. Wilkerson, Assistant Director for Claims, National Veterans Affairs and Rehabilitation Commission, The American Legion).

EXCERPT FROM VA MEMORANDUM DATED JUNE 1, 1987, FROM THE CHIEF MEMBER, BOARD OF VETERANS APPEALS, TO THE VA DEPUTY ADMINISTRATOR, SUBJECT: "GRIEVANCE: INTERFERENCE WITH DECISIONAL INDEPENDENCE OF BOARD MEMBERS". SAID EXCERPT APPEARS AT PAGE 10 OF EXHIBIT "N", ATTATCHED TO STATEMENT PRESENTED BY RICHARD E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF COMMITTEE ON ADVOCACY, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, BEFORE THE HOUSE OF REPRESENTATIVES, HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS. HEARING BOOK PAGE 180.

{***** VVA Exhibit "N", page 10} "4. Reversing Majority Decisions: On various occasions, where the majority of the Board Members, either on an original or an expanded panel have voted to deny a claim, and there has been a request for an administrative allowance, the Chairman has allowed the claims. (See 38 U.S.C. 210(b) and 212(a); 38 C.F.R. 19.184) (See also {a portion of this sentence redacted}. Heretofore, the Chairman had intervened to allow only when the majority had requested an administrative allowance or where there was an expanded panel with an even split. This obviously represents an activist approach and is in derogation of the judicial independence of the Board Members.

5. Failing to assign expanded panels in an impartial manner: On a number of occasions, including a staff meeting on November 3, 1986, the Chairman admitted that on various occasions, either where

there has been a dissent or a request for a reconsideration, he has assigned another section on the basis of his expectation of what the outcome will be. This amounts to "**shopping for judges**" and has the effect of undermining the integrity of the Board.{***** Remainder of letter omitted}

{EMPHASIS ADDED}